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In the Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
PETITIONER

v.

FIRST NATIONAL BANK & TRUST CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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103 pp

QUESTIONS PRESENTED

The Federal Credit Union Act (FCUA) limits federal credit union membership "to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community or rural district." 12 U.S.C. 1759. The questions presented by this petition are:

1. Whether banks, which the court of appeals found not to be among the intended beneficiaries of the FCUA, nonetheless fall within the "zone of interests" of that Act to have standing to challenge the interpretation by the National Credit Union Administration (NCUA) of the FCUA's common bond requirement.

2. Whether the NCUA permissibly interpreted the common bond provision to permit membership in a federal credit union to consist of multiple groups, so long as each group has its own common bond.

PARTIES TO THE PROCEEDING

The appellees in the court of appeals were the National Credit Union Administration; AT&T Family Federal Credit Union; and the Credit Union National Association.

The appellants in the court of appeals were First National Bank and Trust Company; Lexington State Bank; Piedmont State Bank; Randolph Bank and Trust Company; Bankers Trust of North Carolina; and the American Bankers Association.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the National Credit Union Administration, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on the merits (App., *infra*, 1a-14a) is reported at 90 F.3d 525. The opinion of the district court (App., *infra*, 43a-54a) is reported at 863 F. Supp. 9. The opinion of the court of appeals addressing standing (App., *infra*, 15a-31a) is reported at 988 F.2d 1272. This Court's denial of certiorari is reported at 510 U.S. 907. The district court's disposition of the standing issue (App., *infra*, 32a-42a) is reported at 772 F. Supp. 609. A subsequent opinion of the district court enjoining the National

Credit Union Administration (NCUA) from continuing to implement its interpretation of the Federal Credit Union Act (App., *infra*, 55a-62a) and an order clarifying the injunction (App., *infra*, 63a-65a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1996. A petition for rehearing was denied on October 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1759 of Title 12, United States Code, provides in pertinent part (emphasis added):

> Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Board, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; *except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.*

Section 702 of Title 5, United States Code, provides in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

STATEMENT

This case presents issues of extraordinary importance to the National Credit Union Administration (NCUA) and to the Nation's federally-chartered credit unions. Overturning an interpretation of the Federal Credit Union Act (FCUA) formalized by the NCUA in 1982, the court of appeals construed the "common bond" provision of the FCUA to require that all members of a federal credit union share a single common bond. The NCUA's interpretation permits membership in a federal credit union to consist of multiple groups, so long as each group had its own common bond. The court of appeals' ruling, as implemented by the district court, immediately and adversely affects nearly 3600 credit unions serving over 32 million people across the country. Those credit unions hold 79% ($132 billion) of the deposits (shares)[1] and 78% ($94 billion) of the loans of the federal credit union system.

1. a. Congress enacted the FCUA in 1934, after the Great Depression caused the collapse of the Nation's credit markets. Ch. 750, 48 Stat. 1216. At that time, funds available for loans became scarce, and interest rates rose too high to enable persons of limited means

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[1] In the parlance of credit unions, deposits of funds by persons are the "purchase" of "shares" by "members" of the credit union. See App., *infra*, 2a.

to purchase goods on credit. See S. Rep. No. 555, 73d Cong., 2d Sess. 1, 3 (1934); H.R. Rep. No. 2021, 73d Cong., 2d Sess. 1-2 (1934). Because Congress perceived that the Nation's "industrial recovery depend[ed] on the buying power" of ordinary citizens, it established "a Federal Credit Union System" to "bring normal-credit resources on a cooperative basis" to people. S. Rep. No. 555, *supra*, at 1, 3; see H.R. Rep. No. 2021, *supra*, at 1-2. Borrowers would benefit by having an alternative to banks that often would not lend small amounts of money to persons lacking the requisite security, and to "loan sharks" that charged usurious rates. See, *e.g.*, 78 Cong. Rec. 7259 (1934) (remarks of Sen. Sheppard); *id.* at 12,224 (remarks of Rep. Luce). An expansion of credit unions would also facilitate the education of "members in matters having to do with the sane and conservative management of their own money." S. Rep. No. 555, *supra*, at 2.

Expanding access to credit unions, therefore, was a congressional priority. For despite the country's financial upheaval, in the "38 States and in the District of Columbia" where credit unions operated, there had been "no involuntary liquidations," and credit unions had compiled an "exceptional" "record for honest management." S. Rep. No. 555, *supra*, at 2. See also 78 Cong. Rec. 7259 (1934) (remarks of Sen. Sheppard); *id.* at 12,225 (remarks of Rep. Patman).

Under the FCUA, each federal credit union is funded by shares purchased by its members, see 12 U.S.C. 1757(6), and makes loans exclusively to its members and to other credit unions or credit union organizations, 12 U.S.C. 1757(5). The members control the credit union on a democratic basis, with each member having an equal vote regardless of the amount of money held in the institution. 12 U.S.C. 1760. Federal credit unions are managed by a board of directors, a supervisory committee, and (on occasion) a credit committee, all consisting of credit union members who, save for one, serve without compensation. 12 U.S.C. 1761.

In 1970 Congress created the NCUA and empowered it to charter, examine, and supervise federal credit unions. Pub. L. No. 91-206, 84 Stat. 49. The NCUA has the authority to "prescribe rules and regulations for the [FCUA's] administration." 12 U.S.C. 1766(a). Congress intended the NCUA to "provide more flexible and innovative [credit union] regulation." S. Rep. No. 518, 91st Cong., 1st Sess. 3 (1969).[2]

b. Since its passage in 1934, the FCUA has limited membership in a federal credit union to "groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." 12 U.S.C. 1759. See ch. 750, § 9, 48 Stat. 1219. The history behind the original FCUA legislation reveals little about Congress's precise intent in using the phrase "common bond," but the requirement immediately facilitated the expansion of credit unions, because it was "easier to promote the idea of a credit union to a group or an association whose members already had a common bond." Letter from E. F. Callahan, NCUA Chairman, to Fernand J. St Germain, Chairman of House Comm. on Banking, Finance and Urban Aff., at 8 (Oct. 28, 1983) (Callahan Letter), C.A. App. 534; see also A. E. Burger & T. Dacin, *Field of Membership: An Evolving Concept* 8 (2d ed. 1992), C.A. App. 571 (organizing

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[2] The NCUA also insures all federal credit union member accounts. See 12 U.S.C. 1781.

credit unions around "particular groupings" was "simply easier" and involved "generally lower" "start-up costs").

c. In response to changing economic conditions, the NCUA and its predecessors from time to time have modified their application of the common bond provision.[3] In 1982 the NCUA adopted a policy permitting the establishment of credit unions consisting of "multiple occupational * * * groups." Interpretive Ruling and Policy Statement (IRPS) 82-1, 47 Fed. Reg. 16,775. Under this policy, the agency permitted a credit union to add "distinct group[s]" to its field of membership, so long as each group had its own common bond and was within a well-defined area near the credit union's offices. IRPS 82-3, 47 Fed. Reg. 26,808 (1982).

In a 1983 letter to the Chairman of the House Committee on Banking, Finance and Urban Affairs, see C.A. App. 528, NCUA Board Chairman E. F. Callahan explained the important purposes served by the NCUA's policy. First, experience showed that "some groups were too small either by themselves or when

[3] Thus, for example, in 1967 federal credit union regulators replaced their requirement that members of a federal credit union be "extensively acquainted" with each other with the requirement that members simply "know" one another. GAO, *Credit Unions: Reforms For Ensuring Future Soundness* 217 (July 1991), C.A. App. 553. A year later, regulators instituted a policy that, once a person became a credit union member, he or she could remain a member for life. *Ibid.* And in 1972 the NCUA took account of the growing phenomenon of industrial and commercial parks to permit satisfaction of the common bond requirement "if the employees are so situated that as a consequence of their employment and relationship they can be expected to effectively operate a credit union." NCUA, *Organizing a Federal Credit Union* 7 (Sept. 1972), C.A. App. 456.

grouped together to support a viable credit union," so a policy of permitting multiple group additions ensured that credit unions "could serve groups not otherwise eligible for a viable credit union charter." *Id.* at 536. Second, permitting diversification of credit union membership provided a measure of protection against "hard economic times." *Ibid.* As Chairman Callahan pointed out, "[c]redit unions that served only one employer or one industry could be forced into liquidation by plant closings or major industrial slumps." *Id.* at 535-536. By contrast, "a credit union whose membership was made of distinct groups, each group serving different employees or industries, could continue to serve its members," thereby furthering the FCUA's intent to promote "a national system of cooperative credit." *Ibid.*

The NCUA consolidated and restated its chartering and field of membership policy in 1989. See IRPS 89-1, 54 Fed. Reg. 31,168. At that time, the agency reaffirmed that it would permit "select group additions" to federal credit union membership. *Id.* at 31,176. The agency again made clear that "[a] select group of persons seeking credit union service from an occupational, associational or multiple group Federal credit union must have its own common bond," but counseled that "[t]he group's common bond need not be similar to the common bond(s) of the existing Federal credit union." *Ibid.* The NCUA reiterated its new position through a policy statement issued in 1994. See IRPS 94-1, 59 Fed. Reg. 29,066, 29,078, 29,085.

d. From the inception of the NCUA's revised common bond policy, Congress has been made aware of the agency's policy by the NCUA itself, lobbyists from the banking industry, and the General Account-

ing Office (GAO). See, *e.g.*, NCUA Ann. Rep. to Congress 1 (1982), C.A. App. 527; Callahan Letter, *supra*; *Unrelated Business Income Tax: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 1883 (1987) (comments of the American Bankers Association objecting to NCUA's expanded interpretation of the common bond requirement as unfair because it "allow[ed] credit unions to compete with banks and savings and loans for customers among the general public" and complaining that the common bond requirement already "had been loosely interpreted for many years before [1982]"); GAO, *Credit Unions: Reforms for Ensuring Future Soundness* 218-219 (July 1991), C.A. App. 554-555. Despite amending the FCUA many times since 1982, Congress has never altered NCUA's current construction of the common bond provision.[4]

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[4] See Act of Jan. 12, 1983, Pub. L. No. 97-457, §§ 25-29, 96 Stat. 2510-2511; Secondary Mortgage Market Enhancement Act of 1984, Pub. L. No. 98-440, § 105, 98 Stat. 1691 (Oct. 3, 1984); Housing and Community Development Technical Amendments Act of 1984, Pub. L. No. 98-479, § 206, 98 Stat. 2234 (Oct. 17, 1984); Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, §§ 701-716, 101 Stat. 652 (Aug. 10, 1987); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub L. No. 101-73, Tits. IX, XII, 103 Stat. 446, 519 (Aug. 9, 1989); Support for East European Democracy (SEED) Act of 1989, Pub. L. No. 101-179, § 206, 103 Stat. 1310 (Nov. 28, 1989); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. No. 101-144, Tit. III, 103 Stat. 864 (Nov. 9, 1989); Crime Control Act of 1990, Pub. L. No. 101-647, Tit. XXV, 104 Stat. 4859 (Nov. 29, 1990); Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, §§ 251, 313, 105 Stat. 2331, 2368 (Dec. 19, 1991); Housing and Community Development Act of 1992, Pub. L. No. 102-550, §§ 1501-1504, 1604-1605, 106 Stat. 4044, 4081 (Oct. 28, 1992); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 2854, 107 Stat. 1908 (Nov. 30, 1993); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320606, 108 Stat. 2119 (Sept. 13, 1994); Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160 (Sept. 23, 1994).

2. a. Several North Carolina banks, joined by the national trade association for the banking industry (the banks), filed the present suit. The banks sought to overturn the NCUA's 1989 and 1990 approvals of requests by AT&T Family Federal Credit Union (ATTF), a federally-chartered credit union headquartered in Winston-Salem, North Carolina, to expand its field of membership to include various groups of employees of small businesses chiefly based in North Carolina and Virginia. See App., *infra*, 2a, 18a. All told, ATTF has approximately 111,000 members, 35% of whom are employees of AT&T (or affiliates) and the rest of whom are employees of "select employee groups" that were added pursuant to the NCUA's multiple group policy. The suit alleged that the NCUA approvals violate the statutory limitation on federal credit union membership to "groups having a common bond of occupation or association." 12 U.S.C. 1759. After permitting ATTF and the Credit Union National Association to intervene as defendants, the district court dismissed the banks' claims for lack of standing. The court held that the banks were not within the "zone of interests" protected by the FCUA. App., *infra*, 36a-42a.

b. The court of appeals reversed and remanded the case for proceedings on the merits. App., *infra*, 15a-31a. The court held that, although the banks were not the "intended beneficiaries" of the FCUA, they nonetheless were "suitable challengers" to enforce the

statute's "common bond" requirement. *Id.* at 19a. ATTF and its trade association filed a petition for certiorari, which this Court denied. *AT&T Family Fed. Credit Union* v. *First Nat'l Bank & Trust Co.*, 510 U.S. 907 (1993).[5]

c. On remand, the district court granted summary judgment to NCUA and ATTF, holding that the NCUA's construction of Section 1759 was "a reasonable construction of an ambiguous statute." App., *infra*, 54a.

d. Again the court of appeals reversed. The court concluded that Congress's intent to limit federal credit union membership to groups that are bound by a single common bond is "clearly discernible from the statutory text and the purpose of the statute." App., *infra*, 6a. Invoking *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court determined that Congress had spoken "directly" and "unambiguously" to the question in a manner inconsistent with the interpretation given to it by the NCUA. Finding no ambiguity in the statutory language, the court concluded that deference was inappropriate. See App., *infra*, 5a-6a.

The court first reasoned that the term "common bond" in Section 1759 "would be surplusage if it ap-

[5] The NCUA opposed the petition for certiorari because of the interlocutory posture in which the issue came to the Court, and advised that the issue would be more efficiently handled after the merits of the case had been decided. The NCUA nonetheless agreed with the petitioners that "the respondent banks are not within the zone of interests protected by the common bond provision of the Federal Credit Union Act." Gov't Br. in Opp. at 5-6, *AT&T Family Fed. Credit Union* v. *First Nat'l Bank & Trust Co.*, 510 U.S. 907 (1993) (No. 92-2010).

plied only to the members of each constituent group and not across all groups of members" in a federal credit union because "the members of a group are by definition bonded." App., *infra*, 7a. Thus it found that the text of the "Act clearly forecloses" the possibility of "the employees of unaffiliated Company B * * * join[ing] the [federal credit union] at Company A." *Id.* at 8a.

The court further analyzed the statutory text by comparing use of the term "groups" in the parallel provisions of Section 1759: one involving "groups having a common bond of occupation," and the other consisting of "groups within a well-defined neighborhood, community, or rural district." App., *infra*, 8a. Noting that, as to the latter, "[t]he statute does not allow multiple groups, each within a different neighborhood, to form a single community [federal credit union]," the court reasoned that "[n]or therefore can the statute consistently allow multiple groups, each drawn from a different occupation (which the NCUA equates with a different employer[6]), to form an occupational [federal credit union]." *Id.* at 9a.

The court did not find the legislative history to be so contrary to its textual analysis as to require a different result. It rejected the NCUA's arguments that its regulations provided other limitations to the growth and development of federal credit unions, and concluded that the over-arching purpose of the FCUA was to "unite[ ] credit union members in a cooperative venture," a purpose that would be frustrated by the NCUA's interpretation allowing multiple unrelated groups to form an occupational federal credit union.

[6] That is not, in fact, the NCUA's position. See pp. 20-21, *infra*.

App., *infra*, 12a. Based on that reasoning, the court held that "all members of [a federal credit union] must share a common bond," and "[i]f there are multiple occupational groups within a single credit union, then it is not sufficient that the members of each different group have a bond common to that group only." *Id.* at 14a. The court reversed the district court's judgment and remanded the case "for the entry of declaratory and injunctive relief, consistent with the foregoing opinion, concerning the NCUA's 1989 and 1990 approvals of certain applications filed by ATTF." *Ibid.* On October 23, 1996, the court denied rehearing.[7]

e. On October 7, 1996, the American Bankers Association and two other plaintiffs filed a new action in district court seeking a temporary restraining order preventing the addition of new "select employee groups" to all federal credit unions, as well as barring the addition of new members to any existing such group. *American Bankers Ass'n* v. *NCUA*, No. 96-CV-2312 (TPJ). The district court consolidated this new action with the existing case. On October 25, 1996, based on the D.C. Circuit's prior determination setting the meaning of the statutory common bond provision, the district court declared unlawful "membership in a federal credit union by individuals or groups of individuals who do not share a single common bond of occupation with all other members thereof." App., *infra*, 61a. Accordingly, that court

[7] The meaning of the common bond provision in the FCUA is also currently pending before the Sixth Circuit in *First City Bank* v. *NCUA*, No. 95-6543. As we discuss at pp. 28-29, *infra*, the pendency of that appeal does not diminish the importance of granting certiorari in this case.

permanently enjoined the "National Credit Union Administration, its officers, attorneys, agents, employers, and all others in active concert or participation with it, including [ATTF and the Credit Union National Association] * * * from henceforth authorizing occupational federal credit unions to admit members who do not share a single common bond." *Ibid.*

The October 25, 1996, order applies the D.C. Circuit's common bond ruling on a nationwide basis through an injunction covering the NCUA's regulation of all credit unions. Under the injunction, as clarified, no new groups may be added to existing multiple group credit unions, and no new members may be added to "existing occupational groups that do not share a common occupational bond with a credit union's core membership." App., *infra*, 65a. Still pending in the district court is the banks' motion to order retroactive divestiture of groups or members who do not share a common bond with the core group.[8]

[8] The NCUA has sought from the district court a stay of the effect of its nationwide injunction until this Court can rule on the underlying merits of the decision on which the injunction is based. The agency has highlighted the massive disruption the district court's order is causing, while the plaintiff banks are not suffering significant, cognizable injury. The court has not yet ruled on the stay request.

The NCUA also has taken interim, emergency steps to deal with the nationwide injunction. The agency has temporarily changed some of its rules in order to allow certain occupational credit unions to change their status either to that of a community-based credit union or to a single common bond based on a designated trade, industry, or profession. See IRPS 96-2, 61 Fed. Reg. 59,305 (Nov. 22, 1996). These steps will enable some credit unions to retain some of their disputed membership groups, and still be consistent with the D.C. Circuit's rul-

REASONS FOR GRANTING THE PETITION

The court of appeals' decision expands the concept of standing under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, well beyond this Court's precedents, in conflict with another court of appeals; it misconstrues the Federal Credit Union Act (FCUA); and it threatens nationwide instability and losses in the credit union industry affecting millions of persons.

This Court has made clear that, to have standing to challenge administrative actions under the APA, a complainant must suffer an injury that falls within the "zone of interests" that Congress intended to protect in the underlying statute. *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990). By holding that banks have standing to challenge the rules for federal credit union membership established by Congress and implemented by the NCUA, the court's decision squarely conflicts with *Branch Bank & Trust Co.* v. *NCUA*, 786 F.2d 621 (4th Cir. 1986), cert. denied, 479 U.S. 1063 (1987).

On the merits, the court's decision overturns a policy that has been in place since 1982, and upon which thousands of federal credit unions have relied. The NCUA policy construed the statutory phrase "groups having a common bond of occupation or association," 12 U.S.C. 1759, to permit more than one

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ing. These temporary, emergency rules, however, are expected to provide some help in only approximately one-half of the credit unions affected by the nationwide injunction. Thus, even with these emergency measures, the effect of the D.C. Circuit's decision is being felt immediately by thousands of credit unions. In addition, the plaintiffs in the pending district court action have already challenged the validity of even these temporary, emergency measures.

group to join together in a single federal credit union so long as a "common bond of occupation or association" existed for all the members of each group. The court below erred by holding that that phrase could only be construed to mean one or more groups whose members "shared" a single "common bond of occupation or association." The court's interpretation is inconsistent with the text and history of the FCUA, as well as the NCUA's longstanding administrative interpretation, which is entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The court's ruling threatens the survival of many existing federal credit unions across the country. To date, nearly 3600 federal credit unions (or 50% of all federal credit unions nationwide) have relied on the NCUA's common bond policy to absorb some 158,000 employee groups, with millions of members. Of the Nation's 200 largest federal credit unions, 158 have multiple employee groups, with such groups constituting 38% of their credit union's membership. By determining that such membership is contrary to the governing statute, the court's decision adversely affects credit unions with more than 32 million members, assets of $150 billion, loans of $94 billion, and $132 billion in member shares.

The commercial uncertainty created by the court's decision far outweighs any benefits this Court might derive from further percolation of the legal issues presented—particularly since the lower court's nationwide injunction and the venue provision applicable to suits brought against the NCUA are almost certain to pretermit any subsequent litigation on the substantive issue. Accordingly, the petition for a writ of certiorari should be granted. We have expedi-

tiously filed this petition, seeking a ruling by this Court during the current Term, in the hope that the extreme disruption in the credit union industry can be resolved quickly.

1. The court of appeals' decision on standing constitutes an unwarranted expansion of this Court's test for prudential "zone of interests" standing, and it conflicts with the decision of the Fourth Circuit in *Branch Bank & Trust Co.* v. *NCUA*, 786 F.2d 621 (1986), cert. denied, 479 U.S. 1063 (1987). An entity does not have standing to bring suit under the Administrative Procedure Act, unless it can show that it has in fact been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. 702. Thus, it must show that the injury of which it complains "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan*, 497 U.S. at 883. See also *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517, 523 (1991). Courts must examine "Congress' intent in enacting [the relevant statutes] in order to determine whether [the banks] were meant to be within the zone of interests protected by those statutes." *Id.* at 524.

The court below found that "Congress did not, in 1934, intend to shield banks from competition from credit unions." App., *infra*, 21a. Indeed, as the court explained, "the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that the banks disdained." *Ibid.* Neither the text nor the history of the FCUA and its many amendments indicates any concern by Congress "about the

competitive position of banks," as the court below acknowledged. *Id.* at 22a. The court nonetheless held that banks are "suitable challengers" to enforce the FCUA's common bond requirement because there is "a reason to think" that the banks' interest in "patrolling a statutory picket line will bear *some* relation to the congressional purpose" underlying the statute. *Id.* at 27a-28a (emphasis added). See also *Community First Bank* v. *NCUA*, 41 F.3d 1050, 1054 (6th Cir. 1994). The lower court's standing determination thus permits plaintiffs to bring claims not only when the statute evinces no clear purpose to benefit them, but also, paradoxically, when Congress gave every indication that it did *not* intend to benefit them.

In identical circumstances, the Fourth Circuit has held that banks have no standing to challenge the NCUA's interpretation of the common bond requirement. That court found that "the general purposes of the [FCUA], rather than indicating a desire to protect banks, instead suggest that competitive interests of banks were purposefully sacrificed by Congress to the interests of facilitating credit for people of limited personal means." *Branch Bank*, 786 F.2d at 626. Given the rationale for the common bond requirement, the Fourth Circuit held, "we will not attribute to it a meaning that is at cross purposes with the general goals of the statute. If the NCUA were seen to violate the common bond requirement to the detriment of credit union members, they would possess standing to sue. The banks, by virtue of the statute, simply do not occupy a similar position." *Ibid.*

The lower court attempted to distinguish *Branch Bank* on the basis of this Court's intervening decision in *Clarke* v. *Securities Indus. Ass'n*, 479 U.S.

388, 399-400 (1987). In *Clarke*, this Court held that an association of securities dealers had standing to challenge a decision by the Comptroller of the Currency allowing a national bank to set up discount brokerage offices. The Court explained that "[i]n cases where the plaintiff is not itself the subject of the contested regulatory action, the [zone of interests] test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 399. In *Clarke*, this Court upheld the standing of the securities dealers because they were attempting to enforce a requirement that was intended by Congress to limit the reach and scope of services offered by national banks. *Id.* at 403.

The court below concluded that *Clarke* supports the proposition that banks have standing as "suitable challengers" to the FCUA requirement that groups forming credit unions must have a "common bond." Yet unlike in *Clarke*, the banks' suit impedes the congressional purpose of the statute, which is to promote the accessibility and growth of federal credit unions. Contrary to the court's analysis, *Clarke* is perfectly consistent with a rule that would deny the banks' standing in this situation.[9]

[9] The plaintiff banks were found to lack standing in *Branch Bank*. Their petition for certiorari on the standing issue was pending before this Court while *Clarke* was under submission. The Court held the petition pending disposition of *Clarke*, but when *Clarke* was decided, the Court did not grant certiorari, vacate, and remand the decision in *Branch Bank* in light of *Clarke*. Instead, it denied certiorari outright. 479 U.S. 1063 (1987). This treatment negates the D.C. Circuit's view that the decision in *Clarke* undermined the continuing validity of the Fourth Circuit's ruling in *Branch Bank*. There is no reason to doubt that *Branch Bank* still represents the law in the Fourth Circuit.

This Court's more recent decision in *Air Courier*, which the court below did not discuss, lends support to the correctness of the Fourth Circuit's reasoning in *Branch Bank*. In *Air Courier*, this Court eschewed any discussion of the "suitable challenger" test adopted by the D.C. Circuit. In that case, postal employees challenged a decision by the U.S. Postal Service to permit private companies to engage in certain mailing practices, a decision the plaintiffs claimed violated the postal monopoly created by the Private Express Statutes. This Court simply stated that it must inquire into whether the plaintiffs were meant to be within the zone of interests protected by those statutes. 498 U.S. at 524. Finding no evidence that the statutes were intended for the benefit of the plaintiffs, the Court concluded that they lacked standing. *Id.* at 524-526. The Court made no inquiry into whether the plaintiffs would be "suitable challengers" to attack the agency's interpretation of the statutes, and nothing in *Air Courier* suggests that *Clarke* changed the longstanding principles upon which "zone of interests" standing should be analyzed. See, *e.g.*, *id.* at 523, 529-530; see also *Clarke*, 479 U.S. at 399 (determining whether a statute is aimed at protecting the interests of the plaintiff may indicate "whether Congress 'intended for [that plaintiff] to be relied upon to challenge agency disregard of the law'") (quoting *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 347 (1984)).

A square conflict thus exists among the circuits on the standing issue presented in this case. That con-

flict is of considerable importance even beyond the type of challenge made by banks to the NCUA's construction of the FCUA because the D.C. Circuit has applied its "suitable challenger" test in a number of cases since its decision in this case.[10]

2. Independent of the standing issue, review is also warranted on the merits of the court's decision to overturn the NCUA's established construction of the FCUA's common bond requirement. The court of appeals misapplied *Chevron* in failing to defer to the NCUA's reasonable interpretation of the statute Congress charged it with administering.

By limiting federal credit union membership to "groups having a common bond of occupation or association," 12 U.S.C. 1759, the FCUA allows for the possibility that membership in a federal credit union may consist of more than one employee group. At worst—as the court of appeals appeared initially to recognize—the statute is ambiguous: "the plural noun 'groups' could refer * * * to multiple groups in a single [federal credit union]," or "to each of the groups that forms a credit union." App., *infra*, 6a. The court nonetheless overturned the agency's construction by concluding that, despite the apparent imprecision of the statutory language, Congress's intent to require that all members of a federal credit union share a common bond is "clearly discernible" from the statute's text and purpose. *Ibid.* That analysis is flawed.

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[10] See, *e.g.*, *Scheduled Airlines Traffic Offices, Inc.* v. *Department of Defense*, 87 F.3d 1356, 1359-1360 (D.C. Cir. 1996); *Liquid Carbonic Industries Corp.* v. *FERC*, 29 F.3d 697, 705-706 (D.C. Cir. 1994).

a. The NCUA's interpretation of the common bond provision is consistent with the language of the statute. By its terms, the statute limits "Federal credit union membership" to "groups" having a common bond. The NCUA's policy is based on the statute's use of the plural form of the word "group," which makes clear in and of itself, that the membership of a federal credit union can have more than one group.

The language of the opening portion of Section 1759 also supports the conclusion that Congress's reference to "Federal credit union membership" was intended to refer to membership in a single credit union that might include multiple "groups." Section 1759 begins by specifying that "Federal credit union membership" shall consist of "the incorporators and such other persons and * * * organizations" who shall "subscribe to at least one share of *its* stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors." 12 U.S.C. 1759 (emphasis added). The word "its" clearly refers back to the term "credit union" as used in the initial phrase, "Federal credit union membership." Those requirements clearly apply to a single credit union. The provision's subsequent reference to "group*s*" in the context of "Federal credit union membership" is therefore best understood as embracing a single federal credit union. There is no reason to think that Congress used the phrase "Federal credit union membership" in any different manner when it set forth the common bond requirement later in the same sentence. See, *e.g.*, *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) ("identical terms within an Act bear the same meaning"). Accordingly, it was entirely reasonable for the NCUA to read the common bond provision to permit "a credit

union" to be composed of several member groups, each with its own common bond.

b. Under *Chevron*, 467 U.S. at 843, courts are required to defer to an agency's reasonable construction of a statute that it administers if Congress has not addressed the precise question at issue. See *Clarke*, 479 U.S. at 403 ("It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute.") (quoting *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971)). The court of appeals nonetheless concluded that it was "'not required to grant any particular deference to the [NCUA's] parsing of statutory language or its interpretation of legislative history'" when attempting to discern congressional intent "from the statutory text and the purpose of the statute." App., *infra*, 6a (quoting *Rettig* v. *Pension Benefit Guaranty Corp.*, 744 F.2d 133, 141 (D.C. Cir. 1984)). This Court, however, has rejected the proposition that *Chevron* deference is inapplicable to "a pure question of statutory construction." *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987). See also *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813-814 (1995) ("If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.'"). According due deference, the court of appeals should have accepted the NCUA's interpretation of the common bond requirement.

c. The NCUA's interpretation promotes the congressional purposes expressed in the FCUA. Congress enacted the FCUA to promote a "form of credit

organization capable of reaching the masses of the people." S. Rep. No. 555, *supra*, at 3. The NCUA's multiple employee group policy directly advances that goal by permitting employees of small businesses to gain access to credit union services even though those businesses might not have enough potential members to establish a viable stand-alone institution. The FCUA also was designed to "promote the growth of credit unions" and "enhance credit union stability." See *Community First Bank*, 41 F.3d at 1054. The NCUA's policy substantially furthers those goals by ensuring that a single credit union will not be unduly dependent upon the fortunes of a particular company or industry. The court's decision thwarts these statutory concerns.

Notwithstanding the documented congressional purpose to enhance the growth potential of federal credit unions, the court below believed that too much growth would hamper the ability of a credit union to "be a cohesive association" and thus negate a key distinction between banks and credit unions, the latter of which "could 'loan on character.'" App., *infra*, 11a (quoting *First National Bank*, App., *infra*, 22a). The court failed, however, to recognize that the NCUA policy achieves that objective; a member's relationship to the credit union is established through the employer group, thereby enhancing cohensiveness and improving the likelihood that the member will repay the loan. As interpreted by the NCUA, the common bond requirement serves an important purpose by ensuring that each group within a particular credit union has a link among its members; it simply does not require that there be a single link binding together all of the members of the various groups making up a credit union.

Moreover, the court's analysis misunderstands the FCUA and its legislative history. The FCUA places no limit on the size of federal credit unions, and Congress was well aware when it passed the statute in 1934 that some state credit unions had grown sufficiently large that personal knowledge of every borrower's character was impossible. See *Credit Unions: Hearing Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 15 (1933) (statement of Roy F. Bergengren) (noting that Boston's Telephone Workers Credit Union had 16,000 members).[11]

d. The court of appeals erred in concluding that the term "common bond" as used in the FCUA would be rendered "surplusage" by the agency's construction. See App., *infra*, 6a-7a. First, the court mistakenly assumed that the common characteristics that define a "group" under the statute must necessarily be the same as the unifying relationship between individuals embraced in the statutory term "common bond." *Id.* at 7a. Under the NCUA's interpretation, the requirement that members have a "common bond" is in addition to their being part of a "group." To join an occupational credit union under the NCUA policy, a group must show not just that it is defined by an occupational characteristic, but that its members are connected with one another in a relationship sufficiently substantial to qualify as a "common

[11] Moreover, in this regard the court below simply gave too much weight to a concern that has been ameliorated by modern technology and the widespread availability of credit information, which have lessened the necessity for lending officials to be personally acquainted with a borrower to evaluate his or her creditworthiness or the likelihood that a loan will be defaulted.

bond." The agency's interpretation thus gives meaning both to the term "group" and the term "common bond," and renders neither redundant.[12]

Second, the court's construction neglects other important words in the statutory provision. For example, if "a common bond is implicit in the term 'group,'" and all members "must share a common bond," App., *infra*, 7a, then all members of a federal credit union ultimately must be members of a single encompassing group. But the FCUA limits federal credit union membership to "groups having a common

[12] The court of appeals equated the FCUA's use of the term "group" and the term "common bond" by relying on a dictionary definition of "group" as "an assemblage . . . having some resemblance or common characteristic." See App., *infra*, 7a. On the basis of this definition, the court concluded that "a common bond is implicit in the term 'group.'" *Ibid.* But the common characteristic that defines a group can be tenuous or trivial. As the dictionary relied upon by the panel states—in a definition for the word "group" that the panel did *not* quote—a "group" can mean "[a]n assemblage of persons or things" that are "regarded as a unit" simply "because of their comparative segregation from others." *Webster's New International Dictionary of the English Language (Webster's)* 955 (1917) (definition 3). Thus, a group can simply mean "a cluster," or an "aggregation." *Ibid.* By contrast, a "bond" connotes a more substantial connection between individuals—a "uniting" or "cementing" force. 1 *The Oxford English Dictionary* 981 (1933); accord *Webster's*, *supra*, at 251 (a "bond" is "[a] binding force or influence," or "a uniting tie").

The NCUA's regulations expressly recognize the difference between the characteristics that may define a group and those that satisfy the common bond provision. Thus, the agency does not permit a federal credit union to represent "[p]ersons employed or working in Chicago, Illinois," because such occupational groups are insufficiently defined. See IRPS 94-1, 59 Fed. Reg. at 29,076; IRPS 89-1, 54 Fed. Reg. at 31,169.

bond of occupation or association." 12 U.S.C. 1759 (emphasis added). The court suggested that "the plural noun 'groups' could refer not to multiple groups in a single [federal credit union] but to each of the groups that forms a credit union." App., *infra*, 6a. The statute nonetheless equally allows for the possibility that more than one group can join a single federal credit union, as the district court held here and as the legislative history clearly contemplates. See H.R. Rep. No. 2021, *supra*, at 3 (describing federal credit union membership as being "limited to groups having common bonds of occupation or association").

Finally, the fact that the statute limits community federal credit union membership to "groups within a well-defined neighborhood, community, or rural district," 12 U.S.C. 1759, does not support the lower court's reading of the provision requiring a common bond in occupational groups. See App., *infra*, 9a. The NCUA interprets the former to restrict a community federal credit union's field of membership to a single geographic area—a construction grounded in the requirement that a community-based federal credit union serve groups "within" a well-defined locale. The NCUA's construction of Section 1759 does not give the word "groups" a meaning in the common bond provision different than in the community field of membership provision.

For these reasons, the court of appeals erred in concluding that the statute can be read in only one way. When a statute is susceptible of multiple interpretations, the agency's reasonable construction is entitled to deference. *Chevron*, 467 U.S. at 843 & n.11. Well aware of the NCUA's interpretation, see pp. 6-8, *supra*, Congress has not overturned that policy in the numerous FCUA amendments enacted

since 1982. As this Court has stated, such "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985).

3. a. Immediate review by this Court is warranted. The lower court's ruling undermines the legal basis sustaining the charters of nearly 3600 credit unions serving over 32 million people throughout the country. Those credit unions face imminent harm from the district court's nationwide implementation of the court of appeals' ruling. The inability to add new members from existing select employer groups erodes the health of credit unions, which must continually add new members in order to replace those lost through attrition from death, retirement, or other circumstances; it also creates strong disincentives to the continued participation by those employer groups who cannot add new employee members. In addition, the inability to attract new groups and new group members impinges on the justifiable expectations of credit unions that have made or committed to make at least $243 million in capital improvements, branch expansions, and additions of personnel and equipment.

These concerns are not merely theoretical. Petitioner estimates that over 200 multiple group federal credit unions will begin to suffer financial losses in less than six months. The percentage of financially threatened credit unions rises with each month that the lower court's ruling remains the controlling law throughout the country. Petitioner estimates that the credit unions chartered under the NCUA common bond policy will henceforth suffer an aggregate amount of $32.5 million per month in lost loan income.

b. This Court should not await further percolation on the legal issues presented even though the identical issues have been argued and submitted in the Sixth Circuit.[13] While ordinarily this Court might consider waiting to grant certiorari to gain the benefit of the Sixth Circuit's analysis, in this instance any possible benefit of further percolation is greatly outweighed by the continued commercial harm and uncertainty created by the lower court's rulings. Because of the nationwide injunction issued in reliance on the D.C. Circuit's decision, with the exception of the pending Sixth Circuit decision, there is almost no possibility of a conflict developing. If the Court does not grant certiorari in this case, and the Sixth Circuit rules in favor of the NCUA, the agency would have no basis for petitioning for certiorari in that case. Given the nationwide scope of the district court's injunction on remand, the banks in the Sixth

[13] There, the district court relied on a previous Sixth Circuit decision, *Community First Bank* v. *NCUA*, 41 F.3d 1050, 1054 (1994), to hold that a plaintiff bank had standing to challenge the NCUA's interpretation of the FCUA common bond requirement. *First City Bank* v. *NCUA*, Civ. No. 3:94-0334 (M.D. Tenn. Dec. 15, 1994). *Community First Bank*, in turn, had followed the D.C. Circuit's standing analysis in the instant case.

The district court in *First City Bank* subsequently upheld the agency's interpretation of the common bond requirement, finding that the NCUA had acted within the scope of its delegated authority in its application of the statute. *First City Bank* v. *NCUA*, 897 F. Supp. 1042, 1046 (M.D. Tenn. 1995). The plaintiff bank has appealed, and this issue is now before the Sixth Circuit.

Circuit case might well conclude that it is in their interest *not* to seek review by this Court.[14]

Furthermore, even absent a nationwide injunction, banking organizations would invariably bring subsequent suits challenging the NCUA's application of the common bond requirement in the District of Columbia.[15] Therefore, the prospects of any future case producing a circuit conflict are highly remote. Not only is this Court unlikely to derive benefit from delay in consideration of the merits issue raised here, but federal credit unions throughout the country that have relied upon NCUA's construction of the statute would suffer grave commercial harm by the Court's failure to grant a petition for certiorari at this time.

[14] For this reason, in the event the Court determines not to consider the issues presented in this petition until after the Sixth Circuit issues its opinion in *First City Bank*, we respectfully suggest that the petition should be held, so as to preserve the Court's jurisdiction to decide the issues.

[15] Because the respondent American Bankers Association is located in the District of Columbia, venue could always be proper here to challenge the NCUA's interpretation of the common bond requirement. See 28 U.S.C. 1391(e). Therefore, in light of the D.C. Circuit decision, it would be illogical for any member of the banking industry challenging the particular application of NCUA's interpretation to sue in any court other than the D.C. district court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 94-5295

FIRST NATIONAL BANK AND TRUST COMPANY, ET AL., APPELLANTS

v.

NATIONAL CREDIT UNION ADMINISTRATION, APPELLEE

and

AT &T FAMILY FEDERAL CREDIT UNION AND CREDIT UNION NATIONAL ASSOCIATION, APPELLEES

[Argued Sept. 29, 1995]
[Decided July 30, 1996]

Before: BUCKLEY, GINSBURG, and TATEL, Circuit Judges.

GINSBURG, Circuit Judge:

Section 109 of the Federal Credit Union Act (FCUA), 12 U.S.C. § 1759, provides that "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." The question presented in this appeal is whether the members of an occupational FCU must all share a single "common bond of occupation" or, as the National Credit Union Administration (NCUA) contends, membership may be drawn

from multiple unrelated groups, each with its ow common bond. The district court held that the NCUA reasonably interpreted that Act to allow members of unrelated groups to join the same credit union, provided only that a common bond exists among the members of each constituent group. 863 F.Supp. 9 (1994). Because the Congress resolved this very issue the other way, we reverse the district court and disapprove the decision of the NCUA under step one of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984).

I. Background

The plaintiffs-appellants are the American Bankers Association and several North Carolina banks, including First National Bank and Trust Company (FNBT). They brought this suit against the NCUA, the federal regulatory agency that administers the FCUA, seeking to overturn that agency's approval of certain applications filed by AT&T Family Federal Credit Union (ATTF) to expand its field of membership to include employees of various small businesses in North Carolina and Virginia that are unaffiliated with the credit union's existing membership base. ATTF and the Credit Union National Association, a trade association, have intervened in support of the agency.

Under the FCUA, an FCU is, like a mutual association or a cooperative, owned and controlled by its members, *see* 12 U.S.C. § 1757(6); it can make loans to and take deposits from (formally, sell shares to) only its own members and other credit unions, *see id.* § 1757(5). The Congress expected that the Act, by "guaranteeing democratic self-government[,] would

infuse the credit union with a spirit of cooperative self-help and ensure that the credit union would remain responsive to its members' needs." *First Nat'l Bank and Trust Co. v. NCUA*, 988 F.2d 1272, 1274 (D.C.Cir.1993).

The "common bond" provision has been part of the FCUA since the statute was enacted in 1934. The Congress did not fully explicate the purpose or limits of that provision, but "assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default. . . . The common bond was seen as the cement that united credit union members in a cooperative venture." *Id.* at 1276.

From 1934 until 1982 the NCUA interpreted the common bond requirement to mean that the members of each occupational FCU—we put aside the associational alternative, which plays no role in this case—must be drawn from a single occupational group, defined to mean the employees of a single employer. 58 Fed.Reg. 40473 (July 28, 1993). In 1982, however, the NCUA altered its interpretation of nearly 50-years' standing to allow an FCU to comprise not just one but "multiple occupational groups." Interpretive Ruling and Policy Statement (IRPS) 82-1, 47 Fed. Reg. 16775 (Apr. 20, 1982). Each such group need only be within a "well-defined area," IRPS 82-3, 47 Fed. Reg. 26808 (June 22, 1982), by which the NCUA means an area served by an actual or planned office (of which there may be any number) of the credit union, IRPS 89-1, 54 Fed.Reg. 31165, 31170 (July 27, 1989).

The 1982 change of interpretation was intended to enable each FCU to realize economies of scale and to

facilitate occupational diversification within the ranks of its membership. *See* Letter from E.F. Callahan, Chairman of the NCUA, to Congressman Fernand J. St Germain, Chairman of the House Committee on Banking, Finance and Urban Affairs 8-9 (Oct. 28, 1983). The new policy also made it possible for the employees of a company with fewer than 500 employees, the minimum for forming a new FCU, to join an existing FCU. 54 Fed.Reg. at 31171. The NCUA reiterated its new position through policy statements issued in 1989, when ATTF filed the first of the applications that FNBT here challenges, and most recently in 1994. *See id.* at 31165; IRPS 94-1, 59 Fed.Reg. 29066 (June 3, 1994). The agency explained in 1989 that "[a] select group of persons seeking credit union service from an occupational, associational or multiple group Federal credit union must have its own common bond," but "[t]he group's common bond need not be similar to the common bond(s) of the existing Federal credit union." 54 Fed.Reg. at 31176.

FNBT's complaint is at bottom that Interpretive Ruling 89-1 violates the FCUA by allowing groups lacking any common bond among them to join together in a credit union, ATTF in particular. Originally chartered in 1952 as the Radio Shops Federal Credit Union, the common bond of ATTF members was that they were "[e]mployees of the Radio Shops of Western Electric Company, Inc., who work in Winston-Salem, Greensboro, and Burlington, North Carolina; employees of this credit union; members of their immediate families; and organizations of such persons." ATTF has since grown to have 112,000 members in more than 150 disparate occupational groups

spread across all 50 states, including the employees of a major tobacco company, an auto supply chain, and a television station. Its potential membership exceeds 357,000. As of January 1994 ATTF had more than 63,000 loans outstanding, totaling over $268 million. FNBT maintains that by allowing ATTF to accept members from among the employees of any number of employers, the NCUA has in effect opened the membership to anyone with a job.

Initially, the district court dismissed this case for lack of standing, 772 F.Supp. 609, 612-13 (1991); on appeal, however, we reversed on the ground that the banks are "what we have termed suitable challengers, that is . . . their interests are sufficiently congruent with those of the intended beneficiaries that [they] are not more likely to frustrate than to further the statutory objectives." 988 F.2d at 1275. We remanded for a determination on the merits, as to which the district court granted the defendant's motion for summary judgment. 863 F.Supp. 9. The district court held that the common bond requirement is ambiguous and that the NCUA's interpretation of the provision to mean that "a credit union may have several groups, each with its own common bond" is reasonable.

II. Analysis

We review an agency's interpretation of a statute entrusted to its administration under the familiar rubric of the *Chevron* case: If the Congress has "directly spoken to the precise question at issue," the court "must give effect to the unambiguously expressed intent of Congress"; if, however, the statute is silent or ambiguous on the question at issue, then the court will defer to the agency's interpretation if it is permissible in light of the structure and purpose of

the statute. 467 U.S. at 842-43, 104 S.Ct. at 2781-82. In resolving the threshold question whether congressional intent is sufficiently clear for us to review the case under step one of *Chevron*, "we are not required to grant any particular deference to the agency's parsing of statutory language or its interpretation of legislative history." *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 141 (D.C.Cir.1984).

FNBT argues this case under step one of *Chevron* only. According to FNBT, the intent of the Congress is clearly discernible from the statutory text and the purpose of the statute. We agree.

A. *Section 109 by Its Terms*

To repeat, § 109 provides in relevant part that "Federal credit union membership shall be limited to groups having a common bond of occupation ... or to groups within a well-defined neighborhood, community, or rural district." FNBT contends, first, that the article "a" in the phrase "groups having a common bond" means that all members of an FCU must be united by a single occupation. The NCUA counters that the plural noun "groups" in the same phrase indicates that there may be multiple groups in an FCU, so that the statute makes sense only if it is understood to contemplate multiple bonds, each uniting a single group even if the same bond does not unite all groups, *i.e.*, the membership as a whole.

Neither syntactical argument is convincing. The article "a" could as easily mean one bond for each group as one bond for all groups in an FCU, and the plural noun "groups" could refer not to multiple groups in a single FCU but to each of the groups that forms a credit union under the FCUA. Indeed, focusing upon "groups" begs the question whether they must share a common bond; it is, after all, a common bond that makes a group of what would otherwise be a collection of individuals without a theme.

Nonetheless, use of the word "groups" in § 109 does support FNBT's interpretation and not the NCUA's. As a leading dictionary of the time put it, a group is an "assemblage . . . having some resemblance or common characteristic." *Webster's New International Dictionary* 955 (1927). By this definition, a common bond is implicit in the term "group." Therefore, if two or more "occupational groups" can be said to have a common bond, it must be because there is a characteristic common to each and every member of the several groups.

Or, viewing the question another way, the term "common bond" would be surplusage if it applied only to the members of each constituent group and not across all groups of members in an FCU. Instead of limiting membership to "groups having a common bond of occupation," the Congress could, without affecting the meaning of the statute, have simply said "occupational groups." The addition of the term "common bond" is necessary only to impart the idea that the bond is one shared by all members of the FCU—regardless whether the FCU is composed of one or of multiple groups. If the members of a group are by definition bonded, then it is tautological to say that a single group has a common bond; but if multiple groups are said to have a common bond, then there is no tautology—the members of each group share the same bond as the members of the other groups.

For example, because the NCUA defines an occupational group to mean the employees of a single em-

ployer, 58 Fed.Reg. at 40473, it is redundant to require that the workers at Company A have a common bond; their employment by Company A is their common bond and that bond is what makes them an occupational group. Suppose, however, that the employees of unaffiliated Company B propose to join the FCU at Company A. The Act clearly forecloses this possibility for want of a common bond among the employees. Now suppose that Company A buys Company B, which remains a separate subsidiary. Joint ownership of Companies A and B creates a common bond extending across the two groups; the employees of Company B could then become members of the FCU at Company A.

We do not dismiss out of hand the possibility that the term "common bond"—although supererogatory when applied to the membership of a single group—nevertheless reflected ordinary usage in 1934. Moreover, having dissected enough statutes to know that they may upon occasion have redundant terms, *see, e.g., American Fed'n of Gov't Employees, Local 3295 v. Federal Labor Relations Auth.*, 46 F.3d 73, 77 (D.C.Cir.1995) ("no construction of § 1462a [of the Federal Deposit Insurance Act] can avoid rendering either subsection (1) or subsection (2) redundant"), we look further before deciding with confidence that § 109 is unambiguous on its face.

FNBT's second textual argument is that the term "groups" in the two parallel provisions of § 109—permitting credit unions composed either of (1) "groups having a common bond of occupation" among all the members or of (2) "groups within a well-defined neighborhood, community, or rural district"—must be interpreted in a consistent way. *See Wisconsin Dep't*

of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 225-27, 112 S.Ct. 2447, 2455, 120 L.Ed.2d 174 (1992). If the so-called community provision were construed in a manner consistent with the NCUA's revised interpretation of the occupational provision, then a single FCU could include residents of any number of "well-defined neighborhood[s], communit[ies], or rural district[s]" around the country. Yet this expansive construction has never been advocated by the NCUA; on the contrary, the NCUA regulation implementing the community provision expressly requires that all FCU members live, worship, or work in "a single, geographically well-defined area." 59 Fed.Reg. at 29077.

The NCUA answers this argument by noting that the two grammatically parallel provisions of § 109 do not, upon close inspection, use the same terms: "the limitation of geographic groups to those 'within' a defined area," we are told, "clearly supports the NCUA's conclusion that membership in a community credit union may not consist of groups from widely dispersed locales." So it does; no one disputes the correctness of the NCUA's restrictive interpretation of the community clause. But the NCUA's point is not at all responsive to FNBT's argument. The question is how "groups" can be given a different meaning in the two parallel phrases: "groups having a common bond of occupation" and "groups within a well-defined [area]." The statute does not allow multiple groups, each within a different neighborhood, to form a single community FCU. Nor therefore can the statute consistently allow multiple groups, each drawn from a different occupation (which the NCUA equates with a different employer), to form an occupational FCU.

In sum, the FCUA requires by its terms that all members of a credit union share a single common bond. Our example of two companies under joint ownership meets that statutory requirement—and does so without including unrelated groups, which would drain the phrase "common bond" of all meaning. The NCUA may identify and approve other types of common bonds, subject only to the rule of reason embedded in *Chevron* step two. Indeed, the agency might define an occupational group differently—*e.g.*, all workers in the same trade—and perhaps pass muster under *Chevron*. Alternatively, the NCUA may allow multiple occupational groups to form an FCU under a common bond of "association," if one can be found. If the statute is to be read as it is written, however, the one thing that the agency may not do is permit unrelated groups to form a single FCU unless a common bond unites all of the members.

To test the hypothesis that the common bond provision means what it says, we consult briefly the purpose of the statute and its legislative history.

B. *The Purpose of § 109*

First let us dispatch the suggestion of the North Carolina Alliance of Community Financial Institutions, a trade association that filed an *amicus* brief in support of FNBT, that the Congress intended the common bond provision to foreclose unfair competition between credit unions, which are tax exempt, and banks, which are not. ("Without a meaningful common bond provision, credit unions are merely banks with a leg up on other banks.") According to the Alliance, a principal purpose of the common bond is to constrict the market that credit unions can serve, thereby limiting the threat that they pose to banks.

We squarely rejected this argument on the first appeal of this case: "Congress did not, in 1934, intend to shield banks from competition from credit unions. Indeed, the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." 988 F.2d at 1275. Only "as time passed—as credit unions flourished and competition among consumer lending institutions intensified—[did bankers begin] to see the common bond requirement as a desirable limitation on credit union expansion." *Id.* at 1276.

FNBT itself makes a more persuasive argument based upon the purpose of the common bond requirement. The Congress intended that each FCU be a cohesive association in which the members are known by the officers and by each other in order to "ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default. That is surely why it was thought that credit unions, unlike banks, could 'loan on character.'" *Id.* There can be little doubt that growth on the scale achieved by ATTF is inconsistent with that purpose.

The NCUA points out that under its regulations a new group is not permitted to join an existing FCU unless the members are within an area that can reasonably be served from an existing or proposed office of the credit union. *See* 54 Fed.Reg. at 31170. This administrative policy might initially seem to blunt FNBT's claim that under the NCUA's current interpretation of the common bond requirement an FCU could accept anyone as a member simply be-

cause he or she is employed. Upon closer inspection, however, the agency's point is a makeweight. For whatever restraining force the common bond requirement retained after NCUA changed its interpretation of the Act in 1982 it did not impede ATTF's dramatic expansion. Indeed, as recently as 1985, ATTF's field of membership consisted basically of the employees of five AT&T affiliates who worked in, or were supervised from, certain areas within North Carolina or Virginia.

In short, reading § 109 as the 73d Congress wrote it, *i.e.*, to require that a single common bond be shared among all members of an occupational credit union, furthers the overriding purpose of the FCUA—to "unite[ ] credit union members in a cooperative venture." *First Nat'l Bank and Trust*, 988 F.2d at 1276; the NCUA's reading, which permits multiple unrelated groups to form an occupational FCU, frustrates that purpose. If this conception of an FCU seems dated in the world of ATMs and nearly nationwide financial institutions of a scale surely unimaginable in 1934, *see* Douglas H. Ginsburg, *Interstate Banking*, 9 HOFSTRA L. REV. 1133 (1981), then the case for updating the FCUA must be addressed to the Congress.

C. *The Legislative History of § 109*

Finally, we look to the legislative history of the FCUA only to determine whether it so convincingly contradicts our interpretation of the text, reinforced by our understanding of the purpose of the statute, as to require that we rethink the matter. Under these circumstances, only a show stopper would do.

FNBT emphasizes the Report of the Senate Committee on Banking and Currency, which defines a credit union, in part, as "a cooperative society . . . limited in each case to the members of *a specific group with a common bond* of occupation or association." S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934) (emphasis supplied). The NCUA and ATTF extract their version of the legislative history from the Report of the House Committee on Banking and Currency, which paraphrases § 109 as providing that "[m]embership in Federal credit unions is limited to *groups having common bonds* of occupation or association." H.R. Rep. No.2021, 73d Cong., 2d Sess. 3 (1934) (emphasis supplied); *cf.* MARY ANN GLENDON, A NATION UNDER LAWYERS 197 (1994) (quoting Karl Llewellyn: "Never paraphrase a statute"). Thus do the parties replay their jejune debate over the use of a singular article and a plural noun in the statute itself. Not surprisingly, therefore, the NCUA ultimately joins in the district court's conclusion that the legislative history of the common bond requirement is "murky" and provides only "a slender reed on which to place reliance." 863 F.Supp. at 12. Whatever the precise exchange rate between the metaphors may be, a slender reed is not a show stopper.

The district court itself assigned some weight to "the fact that Congress has not objected to . . . the [NCUA's] 1982 expansion" of the common bond requirement. 863 F.Supp. at 13. In a *Chevron* step two analysis, where the issue is whether the agency's interpretation of the statute is reasonable, congressional inaction might be minimally enlightening. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574,

599, 103 S.Ct. 2017, 2032, 76 L.Ed.2d 157 (1983). This is a *Chevron* step one analysis, however; the silence of a later Congress says nothing about the intent of the earlier Congress that spoke directly to the question here at issue.

III. Conclusion

Based upon the text and the purpose of the FCUA, we conclude under *Chevron* step one that all the members of an FCU must share a common bond. If there are multiple occupational groups within a single credit union, then it is not sufficient that the members of each different group have a bond common to that group only.

Accordingly, we reverse the judgment of the district court. The case is remanded to that court for the entry of declaratory and injunctive relief, consistent with the foregoing opinion, concerning the NCUA's 1989 and 1990 approvals of certain applications filed by ATTF.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 91-5262, 91-5336

FIRST NATIONAL BANK AND TRUST COMPANY, ET AL., APPELLANTS

v.

NATIONAL CREDIT UNION ADMINISTRATION, ET AL.
FIRST NATIONAL BANK AND TRUST COMPANY, ET AL., LEXINGTON STATE BANK, APPELLANTS,

v.

NATIONAL CREDIT UNION ADMINISTRATION

[Argued Nov. 16, 1992]
[Decided April 2, 1993]

OPINION

Before: WALD, SILBERMAN, and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Concurring opinion filed by Circuit Judge WALD.

SILBERMAN, Circuit Judge:

Appellants, four North Carolina banks and the American Bankers Association, challenged the National Credit Union Administration's (NCUA) approval of several recent applications by AT & T Family Federal Credit Union (AT & T Family) to expand its membership. According to appellants, the NCUA's decisions violated the requirement of the Federal Credit Union Act (FCUA) that membership in federal credit unions be limited to "groups having a common bond of occupation or association." 12 U.S.C. § 1759. The banks complain that, by allowing AT & T Family improperly to extend its membership and thereby its number of potential borrowing customers, the NCUA has made the credit union a formidable competitor. The district court applied the "zone of interests" tests for prudential standing and determined that appellants lacked standing to sue. Although we agree with the district court that the appellants were not intended beneficiaries of the FCUA, we think that they are suitable challengers because the statute arguably prohibits the competition of which they complain. This case thus falls within the rationale of *Clarke v. Securities Industry Association*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987), and *Investment Company Institute v. Camp*, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971). We reverse and remand to the district court.

I.

Passed in 1934 in the midst of the Great Depression, the FCUA, 12 U.S.C. §§ 1751-1795k (1988), was designed to improve access to credit for people of "small means." S.Rep. No. 555, 73d Cong., 2d Sess. 1 (1934). For many working Americans, credit at reasonable rates had essentially disappeared in the years

following the stock market crash. Lacking the security necessary to obtain loans from banks, working Americans turned to loan sharks who typically charged usurious interest rates, which was thought to reduce the overall purchasing power of American consumers. *See* 78 Cong.Rec. 12,223 (1934). Congress saw the solution to this problem in a system of federal credit unions that would provide credit at reasonable rates and thus would help spur economic recovery. *See id.* at 7260, 12,223-25.

To ensure that credit unions fulfilled their purpose of meeting members' credit needs, Congress restricted credit unions' management and business activities. For example, a federal credit union is owned and controlled by its members, *see* 12 U.S.C. §§ 1757-1761, and it can make loans only to members or to other credit unions, *see id.* § 1757(5). Congress expected that such measures guaranteeing democratic self-government would infuse the credit union with a spirit of cooperative self-help and ensure that the credit union would remain responsive to its members' needs.

A related provision of the FCUA, the common bond requirement, is at the heart of this case. Section 109 of the Act restricts membership in federal credit unions to "groups having a common bond of occupation or association." 12 U.S.C. § 1759. For much of the Act's history, the NCUA interpreted this provision to require all members of a credit union to share the same bond. In the 1980s, however, the NCUA issued a series of Interpretive Ruling and Policy Statements (IRPS) construing the statute to allow a number of different groups, each having its own bond, to form a credit union, even though no

overall common bond united the different groups. *See* 47 Fed.Reg. 26,808 (1982) (IRPS 82-3); 48 Fed.Reg. 22,899 (1983); 49 Fed.Reg. 46,536 (1984) (IRPS 84-1); 54 Fed.Reg. 31,165 (1989) (IRPS 89-1). The NCUA's most recent interpretation, IRPS 89-1, made clear that a credit union could comprise a "combination of distinct, definable occupational and/or associational groups." 54 Fed.Reg. 31,165, 31,170 (1989).

Appellants challenged several decisions in which the NCUA applied IRPS 89-1 to approve applications by AT & T Family to expand its field of membership. Until recently, AT & T Family's membership consisted primarily of employees of AT & T Technologies, Inc., AT & T Network Systems, and Bell Telephone Labs. In late 1989 and 1990, AT & T Family filed eight applications to extend its membership to include groups of employees from other companies such as the American Tobacco Company, Western Auto Supply Company, and WGHP-TV, to name but a few. In all, the NCUA approved the extension of AT & T Family's membership to 16 new employee groups. Appellants claimed before the agency and in the district court that IRPS 89-1 ignored the statutory language by allowing groups lacking any common bond between them to join together in a credit union. The banks contended that by allowing AT & T Family to expand to 71,000 members in violation of the statute, the NCUA has allowed the credit union, which is exempt from state and federal income taxes, *see* 12 U.S.C. § 1768, to become a formidable competitor to banks.

The district court granted NCUA's motion to dismiss for lack of standing. The court determined that appellants were not pressing claims "arguably

within the zone of interests" protected by the FCUA. *See First Nat'l Bank & Trust Co. v. National Credit Union Admin.*, 772 F.Supp. 609, 611-13 (D.D.C.1991). Relying on the language of this court's post-Clarke decisions on prudential standing, *see, e.g., Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C.Cir.1989) (HWTC IV); *Hazardous Waste Treatment Council v. United States Envtl. Protection Agency*, 861 F.2d 277 (D.C.Cir.1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3157, 104 L.Ed.2d 1020 (1989) (*HWTC II*), the district court said that "[t]hose not regulated by an agency have standing only if they are the intended beneficiaries of the specific statute or are nonetheless 'suitable challengers' to the statute because their interests coincide with the interests which Congress did intend to protect." *First Nat'l Bank*, 772 F.Supp. at 611. The banks were not intended beneficiaries of the Act, thought the district court, because "the Act was passed to establish a place for credit unions within the country's financial market, and specifically not to protect the competitive interest of banks." *Id.* at 612; *see also Branch Bank & Trust Co. v. National Credit Union Admin. Bd.*, 786 F.2d 621 (4th Cir.1986), *cert. denied*, 479 U.S. 1063, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987). Under applicable precedent, the district court believed that the banks were not suitable challengers either. Because the banks and the credit union competed for the same business, any coincidence in their interests "would be at best fortuitous." *First Nat'l Bank*, 772 F.Supp. at 612. The banks, according to the district court, could not rely on the Supreme Court's cases, *see, e.g., Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 91 S.Ct. 1091, 28

L.Ed.2d 367 (1971) (ICI); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), that granted standing to competitors as suitable challengers because, unlike the competitors in those cases, the banks were not suing under an entry-restricting statute. *See First Nat'l Bank*, 772 F.Supp. at 613.

II.

It should be noted that no one questions appellants' Article III standing; that appellants will suffer competitive or economic injury is not in doubt. The question before us is whether under the FCUA the banks can claim prudential standing as well. In other words, are they pursuing an interest (not just an objective), *see HWTC IV*, 885 F.2d at 925,[1] arguably within the zone of interests Congress intended either to regulate or protect, and, thus, are they among the class of persons entitled to sue to enforce FCUA's restrictions? *See Clarke*, 479 U.S. at 396, 107 S.Ct. at 755; *Data Processing*, 397 U.S. at 153, 90 S.Ct. at 829. This "zone of interests" test ensures that standing is granted only to plaintiffs who will not distort congressional objectives. It excludes those plaintiffs whose "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399, 107 S.Ct. at 757. Because the banks are not regulated by the common bond requirement, we must inquire whether the banks can be thought to have been "pro-

[1] In *HWTC IV*, we emphasized that "it is the interests that the challenger seeks to protect and not the challenge with which we must be concerned." *HWTC IV*, 885 F.2d at 925.

tected" by that statutory limitation on the activities of credit unions. Litigants can qualify as "protected" by a statute if they are intended beneficiaries of the legislation or are nevertheless what we have termed suitable challengers, *see HWTC IV*, 885 F.2d at 923-24; that is, if their interests are sufficiently congruent with those of the intended beneficiaries that the litigants are not "more likely to frustrate than to further the statutory objectives." *Clarke*, 479 U.S. at 397 n. 12, 107 S.Ct. at 756 n. 12.

Appellants claim that they qualify both as intended beneficiaries and as suitable challengers under the FCUA. We agree with the district court, however, that Congress did not, in 1934, intend to shield banks from competition from credit unions. Indeed, the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained. *See* 78 Cong.Rec. 7259 (1934) (statement of Sen. Barkley) ("[B]ank[s] . . . cannot extend credit to many of these people, because they do not have the required security."); *id.* at 12,225 (statement of Rep. Luce) (noting that credit unions would serve those "who do not use and cannot use banks . . . for small borrowings"). The common bond requirement, an existing characteristic of state credit unions, was designed, in combination with the restriction that permitted credit unions to loan only to members, to ensure that credit unions would effectively meet members' borrowing needs. It would seem, therefore, that Congress assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about

applicants and that borrowers would be more reluctant to default. That is surely why it was thought that credit unions, unlike banks, could "loan on character." *See id.* at 12,223. The common bond was seen as the cement that united credit union members in a cooperative venture, and was, therefore, thought important to credit unions' continued success.[2]

To be sure, as time passed—as credit unions flourished and competition among consumer lending institutions intensified—bankers began to see the common bond requirement as a desirable limitation on credit union expansion. To that end, in the 1970s bankers, according to appellants, became active in lobbying Congress to urge the maintenance of the common bond requirement. But that fact, assuming it is true, hardly serves to illuminate the intent of the Congress that first enacted the common bond requirement in 1934. And we find no indication that Congress was, at that earlier time, concerned about the competitive position of banks.

There remains, however, the more subtle question, whether banks can be thought suitable challengers to enforce a requirement designed to benefit the members—particularly potential borrowers—of credit unions. Appellants rely on the Supreme Court's reasoning in *ICI* and *Clarke*, and it seems to us the parallels between those cases and the present one are striking. In *ICI* the securities industry challenged a

[2] The Senate report on the bill praised credit unions for their record of successful service during the Depression, a record that contrasted sharply with a grim history of bank failures, and attributed the success largely to credit unions' self-government and attentiveness to members' needs. *See* Sen.Rep. No. 555, 73d Cong., 2d Sess. 2-4 (1934).

ruling by the Comptroller of the Currency that would have permitted banks to slip the Glass-Steagall leash and enter what was considered a part of the securities business. *See ICI*, 401 U.S. at 618-19, 91 S.Ct. at 1092-93. As the Supreme Court later explained in *Clarke*, the Glass-Steagall Act, which limited the securities underwriting and investment activities of banks, was designed to protect bank depositors from risky bank activities—not to insulate investment bankers, or indeed, any noncommercial bankers, from competition. *See Clarke*, 479 U.S. at 398 & n. 13, 107 S.Ct. at 756 & n. 13. Nevertheless, because the investment bankers pursued interests congruent with those of the intended beneficiaries, they were permitted to sue in *ICI* to enforce Glass-Steagall's restrictions on banks.

Similarly, in *Clarke* the ever-vigilant securities industry was permitted to challenge a Comptroller decision that authorized a national bank to offer discount brokerage services not only at its established branches, but also at locations both inside and outside the bank's home state. The challenge was based on the McFadden Act, which restricts the interstate branching of national banks. *See Clarke*, 479 U.S. at 391, 107 S.Ct. at 752. The Act was designed to establish competitive equality between national and state banks and thus to protect smaller banks from competition from out-of-state leviathans, *see First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261, 87 S.Ct. 492, 497, 17 L.Ed.2d 343 (1966), not to protect investment bankers. Nevertheless, the investment bankers had standing to sue. The Supreme Court relied on the correlative congressional objective of preventing national banks from gaining too much

("monopoly") control over credit and money through "unlimited branching." *Clarke*, 479 U.S. at 402, 107 S.Ct. at 758. Given that general congressional purpose, the Court thought that the securities industry, which was a competitor at least with respect to discount brokerage services, was a suitable challenger. In other words, even though the Congress that passed the McFadden Act was not at all concerned with the spread of discount brokerage—only branch-banking—and the securities industry was a competitor with regard to the former, not the latter, it was nevertheless permitted to challenge the spread of discount brokerage through the McFadden Act, again because of the congruence of plaintiffs' interests with those of the intended beneficiaries.

We take from these cases the principle that a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect.[3] The limitations may be restrictions on entry—geographic or product line—or they might be, as in our case, limitations on growth, which are akin to entry restrictions. Like more classic entry restrictions, the common bond requirement, by

[3] We cannot agree with the pre-*Clarke* reasoning of *Branch Bank & Trust Co. v. National Credit Union Administration Board*, 786 F.2d 621 (4th Cir.1986), in which the Fourth Circuit focused exclusively on the question whether banks' interests were intended to be protected under the FCUA and concluded that banks do not have standing under the FCUA, *see id.* at 626. The subsequent explication of the suitable challenger route to standing in *Clarke* empties the *Branch Bank* decision of its persuasiveness.

limiting a credit union's customer base, effectively prevents the credit union from offering its services and competing in a broader market.

We previously have recognized the particular significance of statutory entry restrictions on prudential standing. In *HWTC II*, we distinguished the case before us from the Supreme Court's cases granting standing to competitors (*Data Processing*, *ICI*, and *Clarke*), on the grounds that it did not involve an "entry-restricting" statute. *See HWTC II*, 861 F.2d at 284. Similarly, in *Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Administration*, 822 F.2d 1105 (D.C.Cir.1987), we noted that "[c]ompetitors have a seemingly unbroken record of success in securing standing" in cases involving regulatory systems that "restrict[ ] entry into a particular field or transaction." *Id.* at 1109. Indeed, the district court attempted to distinguish this case from *ICI* and *Clarke* on the grounds that the common bond requirement was not an entry restriction.[4] *See First Nat'l Bank*, 772 F.Supp. at 613.

Appellees, sidestepping the entry-restriction cases, rely primarily on our refinement of prudential standing analysis in *HWTC IV*. In that case, an organization of companies that treated hazardous waste and marketed products derived from processed waste sued to force the EPA to adopt stricter environmental regulations on other companies so as to create a

[4] We have expressed concern in the past about allowing potential plaintiffs to gain standing through a facile assertion that they are enforcing entry-restricting legislation (a concern that again highlights the importance we have implicitly attached to entry restrictions in standing cases). *See HWTC II*, 861 F.2d at 284. This, of course, is not such a case.

greater market for their own services and products. We held that HWTC's interests (irrespective of its particular objectives in the case before us) were not sufficiently congruent with those of the intended beneficiaries of the statute to make HWTC a suitable challenger. *See HWTC IV*, 885 F.2d at 924. The treatment firms' interest was in selling more services and equipment to the regulated companies, and therefore the firms would seek regulations that would increase demand for their product regardless of the effects on the statute's intended beneficiaries. We concluded that to have standing under the statute, HWTC would have to have shown a systematic alignment of interests with the statute's beneficiaries, *see id.* at 924, a standard that appellees understandably claim was stricter than our prior characterization of *Clarke* as a test requiring "less than a showing of congressional intent to benefit but more than a marginal relationship to the statutory purposes." *HWTC II*, 861 F.2d at 283.

Our decision did not rest on a conclusion that the economic interests of the treatment firms were somehow less deserving than the environmental interests the statute was designed to foster; nor was it based on a view that the firms' economic incentives were inherently less worthy than the economic objectives of the securities industry plaintiffs in *ICI* and *Clarke*. On the contrary, the economic motivations could be thought analogous. If the watchword of the treatment firms in *HWTC IV* was "treatment is good and more treatment is better," *HWTC IV*, 885 F.2d at 925, it might be said that the watchword of all competitors with regard to their potential rivals must be "regulation is good and more restrictive regulation is

better." And one cannot base standing on one's mere status as an economic beneficiary of government regulation of others. In *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), the Supreme Court said:

> [T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

Id. at 883, 110 S.Ct. at 3186.

The distinction between *HWTC IV* and the Supreme Court's *Lujan* hypothetical on the one hand and *ICI* and *Clarke* on the other must be that in *ICI* and *Clarke* the potentially limitless incentives of competitors were channelled by the terms of the statute into suits of a limited nature brought to enforce the statutory demarcation dividing the banking and securities industries. The interests the securities industry plaintiffs sought to protect were thus less open-ended and more confined than were the economic interests pursued in *HWTC IV*, and as a result there was a reduced danger of distorting congressional purpose. By contrast, nothing in the statute in *HWTC IV* could ensure that there would be any connection at all between the treatment firms' interests and the statutory purpose. "[T]here is not the slightest reason to think that treatment firms' interest in getting more revenue by increasing the demand for

their particular treatment services will serve [the statute's] purpose of protecting health and the environment." *HWTC IV*, 885 F.2d at 924. There is, however, a reason to think that a competitor's interest in patrolling a statutory picket line will bear some relation to the congressional purpose, because the entry-like restriction itself reflects a congressional judgment that the constraint on competition is the means to secure the statutory end. The restriction connects the economic interests of competitors to the purposes of the statute and yet constrains competitors to a limited role in guarding a congressionally drawn boundary. In these circumstances the plaintiffs can be thought to have interests "systematically aligned" with those the statute is designed to benefit.

The securities industry plaintiffs in *ICI* and *Clarke* were not seeking to impose new regulations on banks in areas unrelated to an existing, specific statutory norm simply to provide a demand for their services or to weaken banks as competitors.[5] We certainly would not accept as a suitable plaintiff a party who had only a general economic interest in harming a competitor and who, accordingly, sought to impose some new, more onerous regulation upon that competitor. *See, e.g., Calumet Indus., Inc. v. Brock*, 807 F.2d 225, 228 (D.C.Cir.1986). But, when the plaintiff seeks to

[5] Perhaps it is also relevant—in considering whether a plaintiff has prudential standing, if not Article III standing, *see Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227, 94 S.Ct. 2925, 2935, 41 L.Ed.2d 706 (1974)—to ask whether, as the Supreme Court may well have in *ICI*, one can be confident that the intended beneficiaries had sufficient incentive and organizational resources to sue. See *HWTC II*, 861 F.2d at 284.

enforce a statutory restriction on his competitor—a restriction the plaintiff enjoys as well as the statutory beneficiaries—there is a good deal less risk that recognizing the plaintiff's standing will lead to a misdirection of a statutory scheme.

Our reasoning in *HWTC* suggests that our reaction might be different if the banks appeared before us, not asking to patrol the common bond picket line, but seeking a new regulation that would squeeze the credit unions into a smaller market or even eliminate them from the market altogether. It is unnecessary, however, to extend our holding into a definitive answer to appellants' hypotheticals; we concede that the general issue is devilishly complex. We feel confident, however, that this case is a good deal closer to the paradigm of *ICI* and *Clarke* than it is to *HWTC*, and, therefore, we hold that appellants have standing. The judgment of the district court is reversed and the case remanded.

WALD, Circuit Judge, concurring:

The panel opinion's analysis of precedents on "entry-restricting" statutes quite correctly concludes that, under circuit case law, as well as under the Supreme Court's directives in *Clarke v. Securities Industry Association*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987), and *Investment Company Institute v. Camp*, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971), plaintiff banks have standing to challenge the NCUA's interpretation of the common-bond requirement. I agree with my colleagues that, where an entry-restricting or analogous statute is involved, "a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may do so to prevent the alleged

loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect." Panel opinion ("Panel op.") at 9.

I originally—and still—disagree, however, with the "suitable challenger" test articulated in *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (1989) (*HWTC IV*), which requires a "systematic coincidence," *id.* at 924, or "systematic alignment," Panel op. at 1277-78, 1278, of interests between the would-be plaintiffs and the statute's intended beneficiaries. As I stated at the time, I find this test without roots either in Supreme Court law[1] or in the general purposes of standing. *See HWTC IV*, 885 F.2d at 927-34 (Wald, C.J., dissenting). I recognize, however, that this test is nonetheless part of our circuit law. In that context, I agree with the panel opinion that, when an entry-restricting or analogous statute "reflects a congressional judgment that the restraint on competition is the means to assure the statutory end," Panel op. at 11, and plaintiffs seek only to "enforce the statutory demarcation," *id.*, between the beneficiaries of a licensing scheme and their competitors, plaintiffs clearly satisfy the goal of the "suitable challenger" test, *i.e.*, to ensure that plaintiffs are

[1] It should be noted that, while the Supreme Court in *Clarke v. Securities Industry Association*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1988), did determine that the securities industry was a "proper party" to challenge the Comptroller's decision to permit expanded bank activities, *id.* at 403, 107 S.Ct. at 759, it did so under its own "not . . . especially demanding" zone of interest test, *id.* at 399, 107 S.Ct. at 757, not under any "suitable challenger" test akin to that laid down in *HWTC IV*.

more likely to further than to frustrate the purpose of the statute. *See HWTC IV*, 885 F.2d at 925; *see also Clarke v. Securities Industry Ass'n*, 479 U.S. at 397 n. 12, 107 S.Ct. at 756 n. 12 (citing this as purpose of "zone of interest" test).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIV. A. No. 90-2948 SSH

FIRST NATIONAL BANK AND TRUST COMPANY, PIEDMONT STATE BANK, LEXINGTON STATE BANK, RANDOLPH BANK AND TRUST COMPANY, BANKERS TRUST OF NORTH CAROLINA, AND AMERICAN BANKERS ASSOCIATION, PLAINTIFFS

v.

NATIONAL CREDIT UNION ADMINISTRATION, DEFENDANT, AND AT & T FAMILY FEDERAL CREDIT UNION AND CREDIT UNION NATIONAL ASSOCIATION, INC., DEFENDANTS-INTERVENORS

[Filed: Aug. 9, 1991]

OPINION

STANLEY S. HARRIS, District Judge.

Plaintiffs, five North Carolina banks and the American Bankers Association, challenge decisions by the National Credit Union Administration (NCUA) approving amendments to the charter of the AT & T Family Federal Credit Union (AT & T Family) expanding its field of membership. They allege that when the NCUA approved the amend-

ments, it acted arbitrarily and capriciously, and violated the statutory requirement under the Federal Credit Union Act, 12 U.S.C. § 1751 *et seq.* (FCUA), that there be a "common bond of occupation or association" among the members of a federal credit union association. Pursuant to 5 U.S.C. § 706 and 28 U.S.C. §§ 2201 and 2202, they ask that various NCUA approvals of applications by AT & T Family be declared null and void and that defendant be enjoined from approving similar amendments to AT & T Family's charter. Now before the court are defendant's motion to dismiss for lack of standing and plaintiffs' opposition thereto. For the reasons set forth below, defendant's motion is granted, and the case is dismissed.

BACKGROUND

The Federal Credit Union Act was passed in 1934, in the wake of the Great Depression. After the crash, access to credit had been virtually eliminated for the great majority of the working class: most potential borrowers lacked the security to acquire a loan from a bank, and other licensed money lenders were able to charge extremely high interest rates. S.Rep. No. 555, 73d Cong., 2d Sess. 3 (1934); *see also* 78 Cong.Rec. 7259 (1934). Without access to credit, the nation's lower and middle classes saw their buying power spiral downward. S.Rep. No. 555 at 3.

The establishment of national credit unions, modelled after state supported organizations which had thrived through the economic chaos of the Depression, was seen as a "happy medium" between the loan shark and the bank. 78 Cong.Rec. 7259 (1934). Congress expected that members of credit unions, "with their own money and under their own management,"

would be able to solve their own credit difficulties. S.Rep. No. 555 at 2. It was hoped that with access to small amounts of funds at reasonable interest rates, national credit unions would return significant buying power to those otherwise unable to have it. *Id.* at 1. Though state-sponsored credit unions fulfilled this need in some areas, Congress felt that the nation would benefit from a federal system because it would be capable of rapid expansion and would permit the creation of credit unions in states that did not previously authorize them. *Id.* at 2, 3.

The credit union is distinctive in that it is the members who own and control the organization. Members purchase shares in the credit union and exercise control over it democratically, irrespective of the number of shares held. 12 U.S.C. §§ 1757(6), 1760 (1988). Loans may be made only to members of the organization or to other credit unions. § 1757(5). Each credit union is managed by a board of directors elected annually by and from the members, and no member of the board receives any compensation for these services. § 1761. Supervision and chartering of credit unions is entrusted to the Board of the National Credit Union Administration (NCUA), a three-member panel appointed by the President upon the advice and consent of the Senate. §§ 1752a, 1754, 1756.

At issue in this case is § 109 of the FCUA, now codified at 12 U.S.C. § 1759, which provides that members of a credit union must share "a common bond" of occupation, association, or location. The NCUA has defined a common bond as:

> the sharing of some unifying factor or characteristic among persons that simultaneously links them together and distinguishes them from the general public. This unifying factor must be something more than an unfocused, generalized agreement on a given topic, or a common belief or philosophy on matters of general concern.

45 Fed.Reg. 8285 (1980).

In recent years the NCUA has interpreted the common bond requirement to allow a number of occupational or associational groups to form a credit union if each group shares its own common bond. *See* 12 C.F.R. § 701.1 (1991); 54 Fed.Reg. 31,169 (1989). Plaintiffs challenge decisions by the NCUA approving applications by AT & T Family to expand its membership to include employee groups that have a separate common bond from the AT & T employee group. Defendant moves to dismiss for lack of standing to sue under the FCUA, and is joined in that motion by intervenors AT & T Family and Credit Union National Association, Inc.

DISCUSSION

The Administrative Procedure Act (APA) grants standing to anyone "adversely affected by agency action within the meaning of the relevant statute."[1] 5

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[1] In order to bring their claim, plaintiffs must show that they have both constitutional and prudential standing. *See National Federation of Federal Employees v. Cheney*, 883 F.2d 1038, 1041 (D.C.Cir.1989), *cert. denied*, — U.S. ——, 110 S.Ct. 3214, 110 L.Ed.2d 662 (1990). To establish constitutional standing, a plaintiff must allege an injury-in-fact which is fairly traceable to the conduct complained of and likely to be redressed by the relief requested. *See Allen v. Wright*, 468 U.S.

U.S.C. § 702. In *Association of Data Processing Service Organizations v. Camp*, the Supreme Court explained that a party meets this standard if "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question." 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). Since *Data Processing*, the "zone of interests" test has been the standard by which the Court has judged questions of standing under § 702 of the APA.

The Court clarified what it means for a complainant to be within the "zone of interests" of a statute in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). The ultimate inquiry, it asserted, is centered upon congressional intent. *Id.* at 399, 107 S.Ct. at 757. In view of Congress's evident intent to make agency action presumptively reviewable, a plaintiff has standing only if Congress intended for that particular class of plaintiffs to be relied upon to challenge agency action allegedly in disregard of the law. *Id.* The goal of the test is to exclude those plaintiffs who are more likely to frustrate than to further statutory objectives. *Id.* at 397, n. 12, 107 S.Ct. at 756, n. 12. In cases where a party is the subject of the contested regulation, it is clear that Congress intends for that party to be able to act as a "private attorney general" through bringing a suit to enforce the statute. *Id.* at 399, 107 S.Ct.

737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Because the court dismisses the amended complaint for lack of prudential standing, it need not address the issue of Article III standing.

at 757. But when not the subject of the statute, a party will be denied review if its interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be presumed that Congress intended to permit the suit." *Id.* at 399-400, 107 S.Ct. at 757.

Though the test is not meant to be especially demanding and there need be no explicit indication of congressional purpose to permit the suit, there are occasions where the requisite congressional intent is not present. *Id.* The Court provided a hypothetical example of such a case in *Lujan v. National Wildlife Federation*, — U.S. ——, 110 S.Ct. 3177, 3186, 111 L.Ed.2d 695 (1990):

> [T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

Such a company certainly would have Article III standing because it would have suffered an injury-in-fact which is fairly traceable to the agency action, but it would not meet the heightened requirement of prudential standing as defined by the APA. It simply is not the type of challenge which Congress would have imagined when it passed the statute. *See also Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, — U.S. ——, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991) (union representing

Postal employees does not have standing to challenge the Postal Service's suspension of a statute designed to preserve adequate revenues for the Service.).

The D.C. Circuit has had occasion to clarify this standard further. Those not regulated by an agency have standing only if they are the intended beneficiaries of the specific statute or are nonetheless "suitable challengers" to the statute because their interests coincide with the interests which Congress did intend to protect. *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 924 (D.C.Cir.1989) (*HWTC IV*). A party is a suitable challenger if its interests coincide systematically, and not simply fortuitously, with the interests of those whom Congress intended to protect. *Id.*; *Hazardous Waste Treatment Council v. United States Environmental Protection Agency*, 861 F.2d 277, 283 (D.C.Cir.1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3157, 104 L.Ed.2d 1020 (1989) (*HWTC II*).

The legislative history of the FCUA makes it clear that the Act was passed to establish a place for credit unions within the country's financial market, and specifically not to protect the competitive interest of banks. As noted, credit unions were seen as a "happy medium" between the loan shark and the bank at a time when neither could satisfy the normal credit needs of the working class. 78 Cong.Rec. 7259 (1934). Further, Congress concluded that commercial banks were not in a position to make funds available to those of small means who generally had no security for loans. *Id.* Against this backdrop, it would defy logic to assume that Congress, in passing the FCUA, wanted to protect the interest of banks.

Nor was the common bond requirement included in the Act to protect banks. Instead, it was designed to ensure that credit unions remain responsive to those they were designed to serve. A major selling point for the FCUA was the outstanding record of state credit unions through the Depression, a record which was attributed to their democratic control, honest management, and faithful service to members. Sen.Rep. No. 555 at 2. It was largely through its limitation of membership to those with a common bond that credit unions were thought to fulfill this democratic ideal. *Barany v. Buller*, 670 F.2d 726, 734 (7th Cir.1982); *La Caisse Populaire Ste. Marie v. United States*, 563 F.2d 505, 509 (1st Cir.1977). Such an arrangement was supposed to make credit unions "incapable of exploitation." Sen.Rep. No. 555 at 3. For their part, plaintiffs can cite nothing in the legislative history of the FCUA to buttress their assertion that the common bond requirement was designed to protect banks.[2]

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[2] Plaintiffs point only to a statement made during a hearing regarding a credit union authorization for the District of Columbia two years before the FCUA to support their argument. *See* Plaintiff's Motion of Points and Authorities in Opposition to Defendant's Motion to Dismiss at 12. The speaker mentioned in passing that amendments to the D.C. bill had been proposed after considering the suggestions of the Bankers' Association of the District of Columbia. Even if this court were to accept the legislative history of the D.C. statute as evidence of congressional intent with regard to the federal statute, it is hardly convincing evidence that Congress was trying to protect the interests of commercial banks when it enacted the common bond requirement. In fact, the passage cited emphasizes that the primary concern in authorizing credit unions was that they be successful.

Having shown that Congress did not have in mind the competitive interests of banks when it enacted the common bond requirement, it is a short step to conclude that neither are banks suitable challengers to actions taken under the authority of the FCUA. As this case shows, the interests of banks will rarely if ever coincide with those of credit unions, the interest which Congress did intend to protect, because both compete for the same business. Any coincidence of interest would be at best fortuitous. Thus, because they are neither intended beneficiaries nor suitable challengers, commercial banks are not within the zone of interests which Congress intended to protect when it passed the FCUA.

This position is in keeping with D.C. Circuit decisions on the subject of prudential standing. In *HWTC IV* and *HWTC II*, the court found no standing for waste treatment companies which suffered competitive injury and challenged the regulatory structure for the safe treatment, storage, and disposal of hazardous wastes. Because those regulations were designed to protect human health and the environment and not to improve the business opportunities of waste treatment companies, the court was unwilling to infer that Congress intended for such companies to be able to challenge the regulations. *HWTC IV*, 885 F.2d at 924; *HWTC II*, 861 F.2d at 283. Nor did their interests coincide with the interests Congress intended to protect to the point at which they could nonetheless be seen as "suitable challengers" to the regulations. *HWTC IV*, 885 F.2d at 924; *HWTC II*, 861 F.2d at 283. In either case, the fact that firms are benefitted by congressional action, like the court reporters in *Lujan v. National Wildlife Federation*

and like the commercial banks in this case, does not mean that an agency decision with regard to that decision confers standing. *Id.*; *see also National Federation of Federal Employees v. Cheney*, 883 F.2d 1038 (D.C.Cir.1989), *cert. denied*, — U.S. ——, 110 S.Ct. 3214, 110 L.Ed.2d 662 (1990) (organization of federal employees lacks standing to contest the Army's decision to contract out certain services as violative of statutes designed to coordinate budgeting procedures and increase efficiency in government operations.).

The Fourth Circuit reached the same conclusion when presented with facts virtually identical to these. In *Branch Bank & Trust Co. v. National Credit Union Administration*, 786 F.2d 621 (4th Cir.1986), *cert. denied*, 479 U.S. 1063, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987), the court found no standing for banks to challenge application of the common bond requirement:

> [T]he general purposes of the Act, rather than indicating a desire to protect banks, instead suggest that competitive interests of banks were purposely sacrificed by Congress to the interests of facilitating credit for people of limited personal means. . . . [T]he common bond provision was designed to ensure the cohesive operation of credit unions rather than to limit their reach in an effort to protect banks.

Id. at 626.

Given this specific rationale for the common bond requirement, the court was unwilling to attribute to it a meaning at odds with the general goals of the statute. *Id.* This court shares the Fourth Circuit's basic conclusion.

Plaintiffs erroneously rely on a string of cases in which the Supreme Court has found standing where a group or business has suffered a competitive injury due to agency action. *See Clarke*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987); *Data Processing*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 91 S.Ct. 158, 27 L.Ed.2d 179 (1970); *Investment Co. Institute v. Camp*, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971). Contrary to plaintiffs' assertion, all of these cases involve statutes directed at restricting entry into a given field or business. Even in *Clarke*, where a trade association representing securities brokers asserted that a decision to allow two national banks to open a discount brokerage operation violated anti-branching laws, the Court found standing because the statute was passed in part due to congressional fear that national banks might obtain monopoly control of credit and money if permitted to branch unrestricted. 479 U.S. at 402, 107 S.Ct. at 758. Because those plaintiffs' members competed with banks in providing discount brokerage services, the Court found that Congress arguably had legislated against the competition that plaintiffs sought to challenge. *Id.* at 403, 107 S.Ct. at 759. This intent to restrict entry was what made plaintiffs "very reasonable candidates to seek review." *Id.* As noted, Congress had no such intent when it passed the FCUA.

CONCLUSION

For these reasons, the court finds that plaintiffs lack prudential standing to challenge the action of the NCUA. Accordingly, defendant's motion to dismiss is granted and the case is dismissed.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIV. A. No. 90-2948

FIRST NATIONAL BANK, ET AL., PLAINTIFFS

v.

NATIONAL CREDIT UNION ADMINISTRATION ET AL.,
DEFENDANTS

[Filed: Sept. 15, 1994]

MEMORANDUM OPINION

JOHN H. PRATT, District Judge.

On September 9, 1994, this Court conducted a hearing to consider whether the National Credit Union Administration's ("NCUA") interpretation of the "common bond provision" in the Federal Credit Union Act ("FCUA")[1] conflicts with the clear intent of Congress or whether the Court must defer to the NCUA's interpretation. The issue has been well-briefed on both sides. Based on the arguments and authorities presented by the parties in their briefs and during the hearing, we defer to the NCUA's interpretation of the common bond provision. Plaintiffs'

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[1] 12 U.S.C. § 1751 *et seq.*, particularly § 1759.

renewed motion for summary judgment is denied and defendants' summary judgment motions are granted.[2]

I. *Background*

In 1991, the Court determined that plaintiffs did not have standing to challenge the agency decision because they were not the intended beneficiaries of the FCUA and because Congress did not intend to protect competitive interests. 772 F.Supp. 609 (D.D.C.1991) (Harris, J.). The Court of Appeals reversed, 988 F.2d 1272 (D.C.Cir.1993), *cert. denied*, — U.S. ——, 114 S.Ct. 288, 126 L.Ed.2d 238 (1993), and the matter now comes before the undersigned judge for consideration on the merits.

Plaintiffs, four North Carolina banks and the American Bankers Association, challenge the NCUA's approval of several applications by AT & T Family Federal Credit Union ("AT & T Family") to expand its membership to include the employees of unrelated employers in several areas of the United States. Plaintiffs, which are conventional banks and their trade association, contend that they are suffering from the competition caused by the expansion of AT & T Family. At the September 9th hearing, the Court concluded that it was impossible to consider the validity of the application approvals by the NCUA without examining its interpretation of the common bond provision. The remainder of this opinion will focus on the common bond provision and whether the

[2] Defendants filed two separate summary judgment motions. The first was filed by the NCUA and the second by AT & T Family Federal Credit Union and Credit Union National Association.

NCUA's interpretation conflicts with Congress' intent.

Congress first authorized federal credit unions during the Great Depression. It will be recalled that in March 1933, President Roosevelt found it necessary to close all banks and that the woeful state of the nation's banking system during the early 1930s left large segments of the population without access to necessary credit. Congress reviewed the then existing system of state licensed credit unions and determined that federal credit unions would improve access to credit for people of "small means." S.Rep. No. 55 [*sic*], 73d Cong., 2d Sess. 1 (1934). The basic statute was passed at that time.

By definition, a federal credit union is owned by its members and can issue loans only to its members or to other credit unions. 12 U.S.C. § 1757. To insure sound loan policies in an era before deposit insurance,[3] Congress restricted membership to "groups having a common bond of occupation or association." *Id.* § 1759. The original purpose behind the common bond provision was twofold: to insure the financial stability of credit unions by providing a sense of cohesiveness among members and by enabling the members to establish a borrower's credit worthiness at minimum cost; and to promote the growth of credit unions because it was faster and easier to form a credit union with members who already had a common bond.

[3] Federal credit unions have only been covered by deposit insurance (called "share insurance") since 1970.

Until 1982, the NCUA and its regulatory predecessors interpreted the common bond provision as requiring that the members of each credit union have a single common bond with each other, although beginning in the 1960s, the NCUA began expanding the criteria for determining common bond in response to changing economic conditions. For example, in 1968, the NCUA permitted a "once a member always a member" inclusion under common bond. General Accounting Office, *Credit Unions: Reforms for Ensuring Future Soundness* 217 (1991) (hereafter "GAO Report"). The NCUA has followed a broader interpretation of "common bond" since 1982 which allows multiple unrelated groups to join the same credit union if each group has a common bond among its members.

The expansion of AT & T Family is premised on this interpretation which plaintiffs now challenge.[4] Plaintiffs seek injunctive and declaratory relief vacating all AT & T Family membership approvals since November 14, 1989.[5] Relief is sought on the theory that the NCUA's approval of the membership expansions violates the Administrative Procedure Act ("APA").[6] 5 U.S.C. § 706.

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[4] AT & T Family serves the employees of 150 unrelated employers, and has assets of more than $267,800,000.

[5] The relevance of this date has not been made known to the Court.

[6] The APA allows the reviewing court to set aside agency action found to be "arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with the law." § 706(2)(A).

II. *Analysis*

There are no material questions of fact precluding summary judgment in this case. The Court's review of an agency's interpretation of a statute must follow "the well-trodden path carved out in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 [104 S.Ct. 2778, 81 L.Ed.2d 694] (1984)." *Northwest Airlines, Inc. v. U.S. Dept. of Transportation*, 15 F.3d 1112, 1118 (D.C.Cir.1994). The first prong of the *Chevron* formulation, often called "*Chevron I*," asks whether the Court,

> armed with the traditional tools of statutory construction, . . . can ascertain clear congressional intent on the precise issue before us.

Id. (emphasis added). If the statutory language is silent or ambiguous on this specific issue, the Court then proceeds to the second prong of the Chevron formulation, "*Chevron II*." *Doe v. Sullivan*, 938 F.2d 1370, 1381 (D.C.Cir.1991). Under *Chevron II*, the Court must determine whether the agency's interpretation of the statute is a reasonable one. We are required to defer to the agency's construction of the statute as long as it is reasonable or permissible. *Id.*

A. *Chevron I: Congressional Intent*

1. *The Language of the Statute*

The Court looks first to the language of the statute itself in establishing whether Congress intended to limit credit union membership to individuals having a single common bond.[7] *Nichols v. Asbestos Workers*

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[7] The relevant portion of the statute at issue reads as follows:

Local 24 Pension Plan, 835 F.2d 881, 892 n. 86 (D.C.Cir.1987) ("the best guide to what a statute *means* is what it *says*") (emphasis in original). Plaintiffs argue that the common bond provision should be read in the singular, i.e., that each credit union shall have a single common bond. Defendants counter that the reference to "groups" proves that Congress contemplated multiple groups within a single credit union.

The Court concludes that either interpretation is plausible. The first portion of the statute appears to use "federal credit union membership" in the singular as it requires each member to "subscribe to at least one share of its [the credit union's] stock." It is plausible that the second reference to "Federal credit union membership", in the common bond phrase, is also meant in the singular, but then contemplates several "groups" within that one credit union. A "court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S.Ct. 1737, 1740, 114 L.Ed.2d 194 (1991). Therefore, a reasonable reading of the common bond

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> Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by [the NCUA], as may be elected to membership and as such shall each, subscribe to at least one share of *its* stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; except that Federal credit union membership shall be limited to *groups* having a common bond of occupation or association. . . .

§ 1759 (emphasis added).

provision is that a credit union may have several groups, each with its own common bond.[8]

Plaintiffs counter that such a reading of the statute would permit limitless growth by federal credit unions and frustrate the limitations evident in the statutory language. We disagree. "Whereas almost all private business will serve any customer, the 'customers' of each federal credit union . . . are expressly 'limited to groups having a common bond.' " *United States v. Michigan*, 851 F.2d 803, 807 (6th Cir.1988). Each group must "be employed by the same enterprise" or belong to the same association that has "common loyalties" and holds yearly meetings.[9] 54 Fed.Reg. 31169.

When an agency's interpretation is one of two plausible alternatives, the statute is ambiguous. *International Union, UMW v. Federal Mine Safety and Health Admin.*, 920 F.2d 960, 963 (D.C.Cir.1990)

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[8] The Court disagrees that other federal courts have held to the contrary. In all but one of the cases cited by plaintiffs, the common bond provision was not at issue in the case. *See e.g. Sister of the Presentation of the Blessed Virgin Mary v. NCUA*, 961 F.2d 733 (8th Cir.1992) (determining whether credit union member was an "equity holder" or a "creditor"). The one case that discussed the common bond provision in any detail, *Bd. of Dir. Forbes Federal Credit Union v. NCUA*, 477 F.2d 777 (10th Cir.), *cert. denied*, 414 U.S. 924, 94 S.Ct. 233, 38 L.Ed.2d 158 (1973), was issued prior to the NCUA's 1982 interpretation. In addition, the case concerned an attempt by a credit union to reinterpret its single common bond, not an attempt to reinterpret the concept of a "common bond" by adding unrelated groups.

[9] There are other limits on the expansion of credit unions. *See e.g.* 54 Fed.Reg. 31176 (enumerating various limitations); GAO Report at 219-20.

(statute is ambiguous if it does "not clearly preclud[e]" the agency's approach). Next we look to the legislative history for a possible resolution of this ambiguity.

2. *Legislative History of the Common Bond Provision*

The legislative history concerning the common bond provision is predictably murky and is a slender reed upon which to place reliance. "Congress did not . . . elaborate on th[e] definition [of the common-bond provision] at the time [the FCUA was debated] or express the reason for the requirement." GAO Report at 217.[10] Both sides point to isolated portions of the record; particularly to the differing language in the Senate and House of Representatives committee reports of 60 years ago.

Plaintiffs rely on a statement from a 1934 Senate Report in which the Committee describes credit unions as, *inter alia*, "limited in each case to the members of a specific group with a common bond of occupation or association." S.Rep. No. 555, 73d Cong., 2d Sess. (1934). In context, however, this statement may well be little more than a description of the field of state credit unions as they existed in 1934. It appears to be a descriptive rather than exhaustive

[10] *See also* NCUA, *Studies in Federal Credit Union Chartering Policy* 12 (1979) (hereafter "NCUA Report") ("There is very little in the legislative history that can be characterized as a[n] insightful, analytic discussion of the essence of the [common-bond] phrase, and of its intended scope and application"); A. Burger & T. Dacin, *Field of Membership: An Evolving Concept* (2d ed. 1992).

statement and not meant to define the limits of credit union organization. NCUA Report at 14.[11]

Defendants seize upon the House Report which indicates that "[m]embership in Federal credit unions is limited to groups having common bonds of occupation or association or to groups within well-defined communities." H.R.Rep. No. 2021, 73d Cong., 2d Sess. 3 (1934). We are equally unwilling to overemphasize the importance of this statement. The legislative record, taken as a whole, does not provide the clear and certain indication that Congress intended to preclude the NCUA's current interpretation of the common bond provision. *Rust v. Sullivan*, 500 U.S. 173, 184, 111 S.Ct. 1759, 1768, 114 L.Ed.2d 233 (1991); *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1057 (D.C.Cir.1981).

What remains evident is the overall congressional intent to promote the creation and growth of credit unions. *First Nat'l Bank & Trust*, 988 F.2d at 1275 ("Congress' general purpose was to encourage the proliferation of credit unions"). It is readily apparent that the common bond provision was not the defining characteristic of a credit union.[12] *Barany v. Buller*, 670 F.2d 726, 734 (7th Cir.1982) ("[t]he salient feature of credit unions is their democratic control and management"); S.Rep. No. 555, 73d Cong., 2d Sess. 8 (1934) ("the sole purpose in the bill is to protect credit unions from further losses from the failure of banks

[11] It should be noted that although this report was prepared by defendant NCUA, it predates by three years the interpretive change at issue in this case.

[12] The common-bond concept does not appear anywhere in the statutory definition of a credit union. *See* 12 U.S.C. § 1752(1).

which constituted the greatest source of loss to credit unions during the depression"). In determining the meaning of a specific provision, the Court must look to the provisions of the entire law, and to its object and policy. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S.Ct. 1549, 1555, 95 L.Ed.2d 39 (1987).

The common bond provision was not an end in itself, but its purpose was to support the underlying policy of promoting stable credit unions. It also suggests that Congress intended a flexible interpretation of the provision.[13] This assumption is supported by the fact that Congress has not objected to either the original agency interpretation or the 1982 expansion.[14] "[A] refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction."

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[13] The Court rejects plaintiffs' contention that the NCUA policy is contrary to Congress' intent simply because the policy may represent a change from nearly 50 years of prior interpretation. *Rust*, 500 U.S. at 186, 111 S.Ct. at 1769 ("[t]his Court has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question") (*citing Chevron*, 467 U.S. at 862, 104 S.Ct. at 2791); *see also Nat'l Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 230-31 (D.C.Cir.1992) ("[a]n agency, in light of changed circumstances, is free to alter the interpretive and policy views reflected in regulations construing an underlying statute, so long as any changed construction . . . is consistent with express congressional intent or embodies a 'permissible' reading of the statute").

[14] Congress was repeatedly made aware of the revised common bond interpretation by the NCUA, by lobbyists from the banking industry, and by the GAO. *See e.g.* NCUA 1982 Annual Report to Congress, 1; GAO Report at 218-19.

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137, 106 S.Ct. 455, 464, 88 L.Ed.2d 419 (1985).

The NCUA was given a mandate to "provide more flexible and innovative regulation" in the face of changing economic conditions. S.Rep. No. 91-518, 91st Cong., 2d Sess. (1970), U.S.Code Cong. & Admin.News 1970, p. 2479, 2481. Such economic changes require only brief discussion. For example, until 1970, share accounts in federal credit unions were not insured. Until that time, a restrictive definition of "common bond" served the goal of individualized loan decisions by members who knew one another. *See* GAO Report at 231. Now that share accounts are insured, the NCUA, and it appears Congress as well, has determined that larger credit unions can better spread the risk of loan defaults. *See e.g. id.* at 219 (FCUA amended in October 1992 to allow the NCUA to merge or transfer assets of credit unions in danger of insolvency).

In sum, the congressional record does not provide a clear indication that Congress intended to limit each credit union to a single group sharing a common bond. In the face of such ambiguity we cannot conclude that Congress precluded the NCUA's interpretation of the common bond provision. Therefore, it is necessary to determine whether this interpretation is reasonable.

B. *Chevron II: Reasonableness of the NCUA's Interpretation*

It is well established that, in case of ambiguity, we must defer to the agency's interpretation if it is a reasonable one. Plaintiffs have not seriously argued that the interpretation under challenge is unreasonable. Indeed, it would be a daunting task for them to

do so. The NCUA's interpretation in fact advances Congress' goal of promoting the creation and growth of credit unions. For example, NCUA policy requires that groups seeking to form credit unions have at least 500 members. Many of the recent additions to AT & T Family are companies employing far fewer than 500 people. Employees in small companies have gained the access to credit unions that they would be denied under plaintiffs' interpretation.

III. *Conclusion*

The Court concludes that the NCUA's interpretation of the common-bond provision is a reasonable construction of an ambiguous statute. We acknowledge that it is debatable whether credit unions the size of AT & T Family continue to need the special protection afforded by the FCUA. However, this is a policy matter best left to Congress. Until Congress addresses this matter, the Court will defer to the agency's interpretation of the statute at issue. Plaintiffs' renewed motion for summary judgment is denied and defendants' motions for summary judgment are granted.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 90-2948

FIRST NATIONAL BANK AND TRUST COMPANY, ET AL., PLAINTIFFS

v.

NATIONAL CREDIT UNION ADMINISTRATION, ET AL., DEFENDANTS

No. 96-2312

AMERICAN BANKERS ASSOCIATION, ET AL., PLAINTIFFS

v.

NATIONAL CREDIT UNION ADMINISTRATION, DEFENDANT

[Filed: October 25, 1996]

MEMORANDUM AND ORDER

These two actions have a single common purpose, *vie.*, to force the same federal regulatory agency to cease and desist from enlarging its constituency in

alleged violation of its governing statue. The cases will accordingly be consolidated for all proceedings henceforth.

The National Credit Union Administration ("NCUA"), the agency administering the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1751 *et seq.*, is the principal defendant in both cases. At issue in both cases is a policy, purportedly followed by NCUA since 1982, to permit established federal credit unions to accept groups of new members who do not share a "common bond of occupation" with the existing membership if the members of each new group share such a bond with one another.

Plaintiffs in both cases are representatives of the private commercial banking industry. NCUA's private co-defendants are representative of the interests of the credit unions who are competitors of commercial banks for much personal and family banking business. Credit unions, it is said, possess certain competitive advantages by operation of law, and commercial banks are therefore concerned that credit union membership not proliferate.

Civil No. 90-2948 (hereinafter the "*FNBT*" case) is before the Court on a return of mandate from the U.S. Court of Appeals for the D.C. Circuit for entry of an appropriate permanent injunction against NCUA in accordance with an opinion of a panel of the D.C. Circuit dated July 30, 1996 and reported as *First National Bank and Trust Co. v. National Credit Union Administration*, 90 F.3d 525 (D.C. Cir. 1996).

Civil No. 96-2312 (hereinafter "*ABA*" case) is a recently filed "related" case in which a motion for a preliminary injunction to the same end is pending.

The subject matter of the *FNBT* case was a series of rulings by NCUA in 1989 and 1990 approving

applications by a federal credit union of employees (and their families) of American Telephone & Telegraph Co. (the credit union being known as "ATTF") to admit to membership groups of employees of multiple unrelated business entities, e.g., a major tobacco company, an auto supply firm, and a television station. The plaintiffs in *FNBT* (which included the American Bankers Association) challenged the actions, alleging that Section 109 of the FCUA, 12 U.S.C. § 1759, required that all members of a federal credit union organized as an "occupational" (as opposed to, e.g., a geographic) unit such as ATTF must be employed by a single employer (or related employers) whose business afforded the "common bond" between all members. In its decision of July 30th, the three-judge panel of the D.C. Circuit agreed in substance, and, ruling on the basis of its own construction of Section 109 of the FCUA, held that Congress had expressly foreclosed all other interpretations. The "common bond requirement" of Section 109, the Court of Appeals held, contemplated that *all* members of an occupationally organized federal credit union comprised of more than one "group" must share the same common occupational bond. "[I]t is not sufficient," the Court of Appeals said, "that the members of each different group have a bond common to that group only." 90 F.3d at 531. The decision concluded with an order of remand to this Court to enter declaratory and injunctive relief "consistent with" its ruling, adding, however, the phrase" . . . concerning the NCUA's 1989 and 1990 approvals of certain applications filed by ATTF." *Id.*

NCUA believes the *FNBT* case to have been wrongly decided by the D.C. Circuit, although its petition for a *rehearing* or hearing *en banc* has been

denied. The mandate having issued to this Court in the meantime, however, the *FNBT* plaintiffs demand that the declaratory and injunctive relief "consistent with" the panel decision be entered without delay, and they insist that a general prospective injunction is the appropriate form of relief, not simply a judicial cancellation of the 1989 and 1990 ATTF applications that gave rise to the suit.

For its part NCUA points to the limiting language at the conclusion of the opinion, contending that any injunction entered cannot go beyond the 1989 and 1990 applications at issue in the *FNBT* case. When asked in open court as to the extent to which it will voluntarily comply with the ruling, NCUA asserts that it will refrain from processing further applications *from* ATTF to expand its membership by enrolling similar disparate "groups." Otherwise it intends to continue to do as it has been doing, unless enjoined, and will approve such applications from other federal credit unions across the country, notwithstanding the decision purports to hold the policy itself, not merely the ATTF application approvals, to be *ultra vires*.

The ABA case thus anticipates both the possibility that the maximum relief available to the prevailing parties in *FNBT* will reach only to the 1989 and 1990 ATTF applications, and the probability that NCUA will, notwithstanding the apparent universality of D.C. Circuit decision, persist in approving other similarly flawed applications. The prayer for final judgement in the *ABA* case is, thus, as general as the holding in *FNBT*: a prospective injunction, and a retrospective divestiture of all disparate employee groups acquired by federal credit unions throughout

the country pursuant to NCUA's misconceived policy.

The entry of a preliminary injunction in the *ABA* case will render the scope of any permanent injunction entered pursuant to mandate in the *FNBT* case, and *vice versa*, a matter of purely academic interest. As a practical matter, a "permanent" injunction in the *FNBT* case would remain so only so long as the D.C. Circuit decision stands unreversed and the statute unrepealed or amended. Conversely, a "preliminary" injunction in the *ABA* case would be made permanent as a matter of course upon plaintiffs' motion for summary judgement. No stay having been entered by the Court of Appeals, the mandate having issued despite NCUA's request for its recall, the appeals process having been exhausted in the D.C. Circuit, and NCUA having declared its refusal to acknowledge the decision as the law of the land, the issuance of a permanent injunction by this Court is but a ministerial formality. The prospective injunction, at least, should be entered forthwith.

To the extent plaintiffs may nevertheless be required to satisfy the four elements of a meritorious application for *pendite lite* relief as prayed in the *ABA* case, plaintiffs have clearly done so. First, they are not only "likely" to prevail on the merits, it is a virtual certainty unless the law changes. Second, their members sustain irreparable injury with each new addition to the membership rolls of competing financial institutions, because the amount of financial business they will lose in consequence is impossible to ascertain for purposes of an award of damages, if indeed anyone were liable. Third, NCUA has shown no prospect of an injury to its interests (other than discomfiture) if it is restrained from approving any

more suspect applications, other than a speculative apprehension that the vitality of credit unions will dissipate over time if they are unable to replenish their memberships with sufficient new recruits. Moreover, unlike plaintiffs, NCUA has an alternative remedy available; it can apply to Congress for a change in the law. Finally, and perhaps of greatest importance, it is indisputably in the public interest that the law, once authoritatively declared, be as authoritatively enforced.

NCUA and the intervening co-defendants interpose the defense of *laches*, citing the case of *Independent Bankers Association of America v. Heimann*, 627 F.2d 486 (D.C. Cir. 1980), as "indistinguishable" precedent. They say the commercial bankers have waited 14 years to object to NCUA's multiple group policy, and that NCUA's reliance upon the plaintiffs' apparent resignation to the policy to allow it to create a nationwide system of credit unions comprised of disparate employee groups should estop plaintiffs from complaining now.

The defense is spurious. Whenever NCUA may have first embraced its "policy," it was only manifested over time in a series of progressively more expansive rulings upon specific applications that plaintiffs at first believed themselves without standing to oppose. The *FNBT* case, commenced in 1990 as a challenge to rulings then less than a year old, was dismissed on standing grounds in 1991, 772 F.Supp. 609, 612-13 (D.D.C. 1991), and was not allowed to proceed on the merits until April, 1993. 998 F.2d 1272 (D.C. Cir. 1993). In September, 1994, this Court held that NCUA had made a reasonable interpretation of its legislative mandate and gave judgement for NCUA, 863 F.Supp. 9 (D.D.C. 1994), a judgement that

was not reversed until the D.C. Circuit decision of last July. The *FNBT* case has been diligently and persistently pursued. NCUA was never deluded into a belief that plaintiffs were content to live with its multiple group policy.

The *ABA* case was filed by plaintiffs only when they were alerted in August to NCUA's unwillingness to accept the D.C. Circuit decision as to the meaning of Section 109, and its startling assertion upon the return of mandate that it would not voluntarily obey it except as it pertained to the ATTF rulings of 1989 and 1990. NCUA has shown neither the unreasonable delay nor the reasonable reliance necessary to a meritorious defense of *laches*.

For the foregoing reasons, it is, this *25th* day of October, 1996,

ORDERED, that the plaintiffs' applications for declaratory and injunctive relief in both the *FNBT* and *ABA* cases are granted; and it is

FURTHER ORDERED, ADJUDGED and DECREED, that membership in a federal credit union by individuals or groups of individuals who do not share a single common bond of occupation with all other members thereof is declared to be unlawful; and it is

FURTHER ORDERED, that National Credit Union Administration, its officers, attorneys, agents, employers, and all others in active concert or participation with it, including the intervenor-defendants, are hereby restrained and enjoined preliminarily and permanently from henceforth authorizing occupational federal credit unions to admit members who do not share a single common bond of occupation; and it is

FURTHER ORDERED, that these cases are scheduled for a status conference to determine the course of subsequent proceedings herein on December 4, 1996 at 9:30 a.m.

/s/ THOMAS PENFIELD JACKSON
THOMAS PENFIELD JACKSON
U.S. District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-2948

FIRST NATIONAL BANK AND TRUST COMPANY, ET AL., PLAINTIFFS

v.

NATIONAL CREDIT UNION ADMINISTRATION, ET AL., DEFENDANTS

Civil Action No. 96-2312

AMERICAN BANKERS ASSOCIATION, ET AL. PLAINTIFFS

v.

NATIONAL CREDIT UNION ADMINISTRATION, DEFENDANT

[Filed: Oct. 31, 1996]

MEMORANDUM AND ORDER

Defendant NCUA and defendant-intervenors Credit Union National Association and National Association of Federal Credit Unions (collectively "defendants") seek clarification of the scope of the injunction entered in accordance with the Memorandum and Order of October 25, 1996, granting plaintiffs' motions for injunctive relief in the above-captioned cases.

Specifically, defendants ask the Court's guidance as to whether the injunction: (1) bars NCUA from

approving new occupational groups whose members share a common occupational bond with a credit union's core membership; (2) bars credit unions from enrolling new members from existing (i.e. currently affiliated) occupational groups that share a common occupational bond with a credit union's core membership; (3) bars credit unions from enrolling new members from existing unrelated occupational groups who do not share a common occupational bond with a credit union's core membership; or (4) bars credit unions from enrolling new members from existing unrelated occupational groups approved for affiliation by NCUA prior to 1990, and thus outside the applicable six-year statute of limitations period.

Upon further consideration of the opinion of the D.C. Circuit in the FNBT cases, consideration of the submissions of the parties in connection herewith, and in accordance with the proceedings in open court of October 31, 1996, it is this 31st day of October, 1996.

ORDER, that the order of October 25, 1996 permits the addition of new groups to occupationally organized federal credit unions, provided that the new groups share a common occupational bond with the credit union's core membership; and it is

FURTHER ORDERED, that the Order of October 29, 1996 permits the enrollment of new members from existing occupational groups that share a common occupational bond with the credit union's core membership; and it is

FURTHER ORDERED, that the Order of October 25, 1996 bars credit unions from enrolling new members of existing occupational groups that do not share a common occupational bond with a credit union's core

membership, without regard to when the groups were initially approved for affiliation by NCUA, including those approved more than six years ago.

/s/ THOMAS PENFIELD JACKSON
THOMAS PENFIELD JACKSON
United States District Judge